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THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XX.

BEING REPORTS OF CASES DECIDED
BY THE
SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1918.

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SEP 23 1918

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OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XX.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

STATUTORY MEANING OF THE PHRASE "NEXT OF KIN."

Superior Court of Cincinnati.

MARGARET AMPEY V. CARRIE HIRSCH ET AL.

Decided, June 20, 1917.

*Descent—Title to Non-Ancestral Property—Passes to Children First;
Then to Brothers and Sisters—Sale of Property of Decedent to Pay
Debts—Failure to Make the Heir by One of the Lines a Party—
Knowledge of Claimant of the Proceedings—Rights by Reason of
Adverse possession.*

1. The construction to be placed on "the next of kin" as used in Sub-section 6, General Code, 8574, makes the brothers and sisters of an intestate or their legal representatives nearer of kin than the parents or grandparents. The brothers and sisters of the intestate's father and mother or their legal representatives are nearer of kin to the intestate than the grandparents.
2. As between tenants in common the entire possession of one will not generally cause the statute of limitations on adverse title to run against the co-tenant. But if the one co-tenant's possession is asserted as exclusive owner, openly, unequivocally, adverse, hostile and to the exclusion by overt act against and with actual notice to the other co-tenant, it will ripen into an indefeasible adverse perfect title in favor of the occupying tenant.

William Shepard, for plaintiff.

Harry Hess, contra.

GUSWEILER, J.

This is an action in partition in which the plaintiff claims one-sixth interest in certain valuable non-ancestral real estate, located in Cincinnati, Hamilton county, Ohio, as heir at law of Louisa Wilcox, who died about March 11, 1877. The realty in question came by deed from Nicholas Longworth in 1847 to Polly Smith for her life with remainder over to Louisa Wilcox in fee. Polly Smith deceased prior to Louisa Wilcox. Louisa Wilcox left no children, no husband, no brothers or sisters of the whole or half blood, no father or mother, but left surviving her, representatives of her mother's deceased brother and representatives of her father's deceased brother, these representatives being related to the decedent, Louisa Wilcox, in the same degree as cousins. Plaintiff claims as heir, being one of the cousins of decedent, and being one of the children of the decedent's father's brother. The defendant's contention is that the uncles of the decedent, or their legal representatives, do not share as heirs, in that the estate should ascend and go to the lineal grandparents or their legal representatives.

The first question for construction and determination in the instant case is subdivision 6, G. C., 8574, reading as follows:

"If the father and mother are dead the estate shall pass to the next of kin and their legal representatives to and of the blood of the intestate."

We are of the opinion that this estate being non-ancestral the next of kin related to Louisa Wilcox, deceased, are her uncles of both the maternal and paternal side, and the legal representatives of said deceased uncles take by representation. It follows that plaintiff's contention is correct, she being a child of one of said uncles and a cousin to decedent, and she is entitled to share as heir and next of kin to decedent as set out in her petition.

"Legal representatives" as used in the statute of descents, means "lineal descendants." *Thomas v. Lett*, 4 N. P. (N.S.), 393; 6 L. D., 429.

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The expression "next of kin," as used in our statute, means the next of kin as determined by the statute of descent and distribution as construed by the courts, and while degrees of consanguinity are to be determined by the civil law and not the common law (*Clayton v. Drake*, 17 O. S., 367; *Gildehaus v. Schildman*, 10 N. P. (N.S.), 241; *Prickett v. Parker*, 3 O. S., 494; *Curren v. Taylor*, 19 O., 36), yet the statute of descent and distribution is the primary authority to determine the case. The statutory rule of descents is the only rule of descent in this state, and the next of kin as provided in G. C., 8574, paragraph 6, must be determined in conformity with the manifest policy and spirit of the statute as interpreted and construed by the courts.

In *Drake v. Rogers*, 13 O. S., 21, 31, it is said:

"And from that time (February 22, 1805, the date of the enactment of an act regulating the course of descent and distribution) to the present, under all the several revisions and amendments, the statutory rule of descents has always been assumed to be the only rule of descent and property applicable to the estates of intestates in this state."

In *Penn v. Cox*, 16 O., 30, 32, the court says:

"We understand the act regulating descents and the distribution of personal estates as embracing the whole subject and intended to provide for all possible cases."

The statutes relative to both ancestral and non-ancestral property clearly show a settled policy to prefer children as being nearer of kin than parents, and brothers and sisters as nearer of kin than either parents or grandparents.

Section 8574, G. C., relating to non-ancestral property, in conformity with the rule of the common law against the estates lineally ascending, gives the estate of a decedent to his children, to the husband and wife or to the brothers and sisters of the whole or half blood before devolving it upon the parents, thus recognizing that brothers and sisters are nearer of kin than parents, and by parity of reasoning, uncles and aunts are nearer of kin than grandparents. G. C., 8573, which relates to ancestral property, recognizes the same principle, and is in harmony with this interpretation as to who are next of kin.

Our Supreme Court, in the case of *Curren v. Taylor*, 19 O., 36, recognizing this policy of our statutes of descent, has adopted this interpretation as to who are the next of kin. G. C., 8573 and 8574, after making certain specific provisions as to the course of descent, provide that in the absence of persons entitled to take the estate under the preceding provisions, that "the estate shall pass to the next of kin of the intestate" or their legal representatives, the ancestral statute limiting such next of kin to the blood of the ancestor from whom the estate came.

In the case of *Curren v. Taylor*, above referred to, it became necessary to construe this phrase "the next of kin" as used in the ancestral statute, and the court there held that the brothers and sisters of the intestate's father and not the grandfather should take the inheritance. The court there says:

"The argument is pressed with earnestness, that the civil law should govern, and not the common law, in determining who is the next of kin intended in this clause, and that in accordance with the better feelings of our nature, the grandfather is regarded as a nearer relative than uncles or aunts. *It has been the settled policy of the state, in its law of descent, to direct the property of a deceased brother to pass to the brothers and sisters who survive him, to hold them in this respect as nearer than the father, or at all events to prefer them to the father;* even in a case where all the property had come by gift directly from him. If George Arter had died without a child, the estate now in controversy would, under the statute we are now considering, have passed to his brothers and sisters, and not to his father. Now it is difficult to understand why this law should be suffered to remain in force here, where statutes are so easily, and in point of fact, so frequently subjected to alteration and repeal, if there be in reality any general sentiment or feeling opposed to this principle of descent. *In putting a construction upon the statute, or upon parts of it, we, as a court, at least, would feel ourselves called upon to give some attention to the principle so recognized in the law of descents. * * * We think that by a proper interpretation of the statute in question, the brothers and sisters of the intestate's father, and not the grandfather, should take the inheritance.*"

This language of the court was cited with approval in the case of *Lyon v. Lyon*, 1 C. C. (N.S.), 246, 251; 14 O. D., 498,

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as establishing the principle that the policy of the law shown in one part of the statute is to be applied to and control in the interpretation of other parts of the same statute, in this case, that the heirs of the half blood should be excluded in determining the next of kin under the sixth paragraph of G. C., 8574. The court there says:

“Suppose, for instance, to show the analogy between this case I just read from (*Curren v. Taylor*) and the case at bar: That this father had the property; that he died seized of the property, not the son, Andrew L, but Lucius died seized of this property, and he failed for heirs in the lineal line. The statutes would not send it back to the father, but would send it to his brothers of the whole blood. If the father had died seized, then the statutes of the state would send it to his brothers of the whole blood. * * * We think that if this estate came back to this father or to the mother, and the father or mother held for ever so short a time, if they lived just long enough to arrest the title in themselves after the death of the son, it would have gone to the brothers of the whole blood, and there is no reason that it should not go to the same heirs that it would have gone to if they had lived long enough to arrest the title.”

To show the analogy between the cases of *Curren v. Taylor* and *Lyon v. Lyon* and the case at bar, let us suppose that the father or mother of Louisa Wilcox had survived her for ever so short a time, and had then died, the statute would send the estate to the brothers and sisters of such parent (the uncles and aunts of Louisa Wilcox) and only upon the failure of such uncles or aunts and their legal representatives, would the estate pass to the grandparents, “and there is no reason why it should not go to the same heirs that it would have gone to if they had lived long enough to arrest the title.” (*Lyon v. Lyon*.)

In the case of *Curren v. Taylor*, the grandfather claimed the estate, first, as an ancestor, second, as next of kin of the grandson. Both of these claims the court decided in the negative. The principle enunciated is not an *obiter*, but the deliberate decision of the court upon the question before it, that when “next of kin” are to be determined under our statute of descent and distribution, the uncles and aunts of the intestate are to be preferred as nearer of kin than the grandparents. The fact that

this decision was made in construing the statute as to ancestral property does not alter the case, the only difference between the statutes in this respect being that the estate devolves upon the "next of kin and their legal representatives, to and of the blood of the intestate," in case of non-ancestral property, and upon the "next of kin to the intestate of the blood of the ancestors from whom the estate came or their legal representatives," in case of ancestral property.

We are of the opinion, therefore, that under the statute and these decisions of our courts, the uncles of Louisa Wilcox are her next of kin, and that the legal representatives of deceased uncles take the shares of such decedents.

The second contention of plaintiff is that the property in question was sold to pay debts by Anthony Rice, administrator of the estate of Louisa Wilcox, deceased, to Annie Conley (case No. 54874, Hamilton County Common Pleas Court) in 1878 without making plaintiff a party to said proceedings, and it is admitted that all of said proceeds of sale were used to pay said debts.

It is admitted that the cousins of Louisa Wilcox, deceased, on the maternal side were properly made parties in the administrator's sale case referred to, but that the plaintiff and other cousins of Louisa Wilcox on the paternal side were not made parties thereto. It is proven in evidence that this plaintiff had *actual notice* of said sale proceedings and *knew* that Annie Conley purchased said estate under said sale from said administrator and went into possession, and that the proceeds from said sale were all consumed in the payment of debts of said Louisa Wilcox, deceased. Plaintiff contends that because she and the other cousins on the paternal side of the decedent, Louisa Wilcox, were not made parties to said administrator's sale and were not served with summons, that the plaintiff did not have her day in court and that said sale did not affect her rights as heir; that she thus became a tenant in common with Annie Conley and her privies and grantees ever since and that as against this plaintiff, Carrie Hirsch can not plead adverse title, etc.

It is not denied that plaintiff had *actual notice* of said administrator's sale in 1878 to Annie Conley, and that no service was

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made upon her, advising plaintiff thereof as she is entitled to in law. The evidence discloses that the administrator delivered his deed to Annie Conley in July, 1878; that she deeded said property to Louisa Felsenthal in March, 1905, and that she gave a deed therefor to the defendant, Carrie Hirsch, in October, 1908, and that all the grantees occupied the premises, claiming exclusive ownership openly under color of title adversely against the world. Can plaintiff at this late time claim title in herself under all these circumstances? The evidence discloses that there were no circumstances surrounding the purchase and the taking of possession of said premises by Annie Conley that would indicate any question of title in anyone else as tenant in common; on the contrary, Annie Conley took possession and occupied the same as the sole title holder, the exclusive proprietor, paid the taxes for twenty-seven years as owner thereof, and held the same openly to plaintiff's notice, as such unequivocal owner. There is no denial that plaintiff knew that Annie Conley in 1878 was claiming said premises as sole and exclusive proprietor and owner. If plaintiff did have this *actual positive notice*, is she not barred now by the statute of limitations?

The defendant pleads open, notorious and adverse title as against plaintiff. Plaintiff contends that the administrator's deed to Annie Conley passed no title as affecting her because of lack of service upon her and as to her, the occupancy of said premises by Annie Conley and her privies was not adverse but that of tenants in common with plaintiff.

The evidence clearly shows that the proceeds secured from the sale by the administrator of the premises herein were used entirely to pay the debts of the decedent owner in 1878, and that nothing was left for distribution to the heirs. By force of *Stout v. Stout*, 82 O. S., 358, the rights of the heirs are inferior and subsequent to that of the administrator to sell to pay debts, even admitting that the title descends to the heirs. The right of the heirs to partition is subservient to the right of the administrator to sell to pay debts, and if all the proceeds derived from said sale were so used it is hard to conceive how the heirs would have any claim in law or equity, whether served with process or not.

However, for the purpose of argument even if we should admit that plaintiff is correct in her contention that the lack of service of process upon her made her a tenant in common with Annie Conley, the grantee under the administrator's deed, does not the statute of limitations bar her right now to claim against adverse possession even without color of title?

It is true generally that the mere naked possession by one tenant in common is not in law adverse to the other co-tenant because it is not antagonistic or inconsistent with the co-tenant's claims. But the instant case presents undisputed evidence that plaintiff knew of the administrator's sale, the purchase of the premises by Annie Conley, of her occupancy since 1878 under an exclusive, open claim of ownership against the world; occupying all of the property, paying the taxes as owner; that her grantees and privies have likewise so occupied and possessed said premises for more than twenty-one years, in fact up until 1912, when for the first time, plaintiff lays claim to said realty by filing her suit in this case. The evidence indicates actual, open, notorious exclusive, continued, adverse hostile possession against the world and against plaintiff since 1878.

Even if plaintiff should be regarded as a tenant in common, the evidence in the instant case indicates that the possession and occupancy and the payment of taxes all these years by Annie Conley and her privies was of an overt character, claiming title, unequivocally asserting ownership antagonistic and hostile to every and any person claiming whatsoever, and especially adverse to plaintiff's claim, and not that of naked possession such as a tenant in common. This was an assertion of an independent, absolute title as against plaintiff and the world, a direct assertion of entire title and a public proclamation to all persons that she and her privies were the owners of said estate. Annie Conley took the property under color of title at least. She went into possession under such title and she and her privies continued in such possession openly with actual notice to plaintiff and adversely as against plaintiff's claim as tenant in common for thirty-four years.

We are of the opinion that the holding of Annie Conley was a denial of plaintiff's claim and was clearly adverse to this

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plaintiff and that she had actual notice thereof at the time, in 1878, and has had ever since. 8 Dec. Rep., 101; *Ward v. Ward*, 11 C.C.(N.S.), 396; 13 Dec. Rep., 862; *Earl v. Hall*, 14 O. D. (N. P.), 234; 4 O. L. R., 389; *Wilson, Admr., v. Wilson et al*, 6 N.P. (N.S.), 489; *Gill et al v. Fletcher*, 74 O. S., 295. We find from the evidence that Annie Conley, the grantee under the administrator's sale, asserted ownership of the entire premises herein in an unequivocal manner by positive and overt acts, hostile and to the exclusion of plaintiff's rights, if we should admit plaintiff was a tenant in common, and it follows that such assertion of title against a co-tenant will become, and has become adverse by the lapse of time, innuring to this defendant a perfect title by adverse possession for more than twenty-one years. *Youngs v. Heffner*, 36 O. S., 232; *Freeman on Co-tenancy and Par.*, Section 230 *et seq.*

We are of the opinion that color of title was not necessary in this case in view of the open, unequivocal, hostile, exclusive, notorious, antagonistic, adverse occupation by Annie Conley and her privies all of whom occupied openly and with actual notice to plaintiff to the exclusion of the plaintiff's rights. *Lessee of Paine et al v. Skinner et al*, 8 Ohio, 159; *McNeely v. Langan*, 22 O. S., 32; *Wilson v. Wilson et al*, 11 C. C. (N.S.), 450; *Humphries v. Huffman*, 33 O. S., 395; *McCreary v. McCreary et al*, 11 N.P.(N.S.), 401. It follows that the title of the defendant, Carrie Hirsch, is held perfect and quieted, partition is denied and the petition of the plaintiff will be dismissed at plaintiff's costs.

APPROPRIATION BY RAILWAY OF RIGHT TO OCCUPY STREET.

Common Pleas Court of Hamilton County.

CINCINNATI SOUTHERN RAILWAY V. RUKARD HURD.

Decided, October Term, 1916.

Appropriation—Injury to Abutting Property From Occupancy of Street by Railway Track—Similar to that Suffered by the "Residue" in Ordinary Cases—Rights in Street Limited to Such as Are Appurtenant to Abutting Lots—Pleading in Appropriation.

1. In the absence of any provision in the municipal code for an answer in an appropriation proceeding, a motion to strike an answer in such a case from the files will be granted.
2. The so-called "day light" ordinance is a valid enactment and controls the use of Front street, Cincinnati, by the railway companies occupying that street.
3. Where no physical part of a lot is taken, but the appropriation relates to occupancy of the street with an additional railway track, the injury to abutting property is similar to that suffered by the "residue" in ordinary cases of appropriation.
4. Rights in the street, appropriated in such a case, are such as are appurtenant to the abutting lots, and where one of the abutting lots is used in connection with other land as a part of the same plant, but such other land does not abut on the street, testimony as to damages likely to result to such other land is not admissible.

Alfred Bettman, for plaintiff.

Pogue, Hoffheimer & Pogue and *Healy, Ferris & McAvoy*,
contra.

WARNER, J.

Motion to strike answer from files.

I will state, very briefly, the conclusions at which I have arrived on the questions that have been presented in argument, up to this time, in this case.

I think this proceeding has been properly brought and conducted, according to the municipal code, for the appropriation of property. There is no provision of the municipal code that provides for an answer in appropriation cases, and no answer is necessary. Therefore, the motion to strike the answer of the

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Klaine Company from the files must be granted, upon authority of *Pittsburg, C., C. & St. L. Ry. v. Greenville*, 69 Ohio St., 487, 496.

It does not appear that the proposed track of the Southern Railway Company on Front street lies contiguous for loading and unloading, as these terms are defined in *Rheinstrom v. Railway*, 52 Bull., 187, to any manufacturing establishments, etc., nor does it appear that the Pennsylvania track so lies. It would seem, therefore, equally certain that Sections 8998-9000, G. C., as to the manner and time of switching, are not applicable to this case.

I think the so-called Daylight ordinance is a valid ordinance, and controls the use of Front street by the railroad companies occupying that street.

The further question before the court, is as to admitting evidence relating to other property than that described in the application, where such other property is used with that so described for the purposes of a single plant. There can be no question that where land is taken which is part of a larger tract, used for one purpose, damages to the residue may be included, and a very liberal rule in determining what constitutes residue obtains in this and other states, in order that full compensation may be made the owner. So, owners of farming lands as well as lots in cities, used for a single purpose or business, when any part thereof is taken, may recover damages for what remains.

In the case on trial, we have an entirely different situation. No physical part of any lot is taken. The appropriation relates entirely to rights of abutting property in the street. The nature of this case, therefore, so far as injury to abutting property is concerned, is very much like damages to the residue in the other class of cases, the abutting lots being the residue in this case.

Inasmuch as no part of the abutting land is taken, there is no interference with the use of the same except such as may come from the use of the street for the purposes of the appropriation. The placing of the tracks at grade, as proposed, would not alone offer more than nominal damages to abutting owners, because neither light nor air, ingress or egress will be affected by the mere presence of the tracks in the street.

The additional use of the new track by the locomotives and cars, loaded and unloaded, during the hours permitted by the daylight ordinance, affords a claim for damages to the abutting property, the amount of which is to be determined by this jury.

This brings us to the question of what constitutes abutting property, as to which damages may be shown. Clearly, the land described in the application, running back to the alley, as shown on the plat filed with the application, is within the rule. But, if such abutting land is used in connection with other land, remote from and not adjoining the rights appropriated, but adjoining said abutting land, as one plant, should evidence be admitted as to the effect of the appropriation upon such remote land, as to which no rights are sought to be taken by this application and which land is not set up therein? I think not. The cases holding that where a part of physical property used as one plant is taken, damages to the residue of the land so used may be shown are not decisive or pertinent to this case. The reason is obvious. In this case, no part of the physical property used as one plant is taken, and the language used by courts in deciding other cases must be referred to the facts of such cases, and not extended to cases where the controlling facts are essentially different. The rights of abutting property in Front street, which are appropriated in this case and the character of the use of such appropriative rights, as disclosed by the application and as allowed by city ordinance, is not indicative of any material effect upon property that does not abut the appropriation. But if, in some way not apparent, other than abutting property is damaged by this appropriation, such property was not brought into this case, nor can it be now.

In *Grant v. Hyde Park*, 67 Ohio St., 166, it was all damages to the residue, after a part was taken, that the court decided must be recovered, in the one proceeding. In the case on trial, it is damages to the abutting property after the rights thereof in the street are abridged, as appropriated, that are recoverable, and it is difficult to say why such recovery does not afford full compensation for what is taken.

The rights in the street affected by this appropriation are appurtenant to the abutting lots under the conditions of this

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case, and evidence therefore, as to other property, must be excluded.

**FAILURE OF LEGACIES WHERE NOT MADE A CHARGE
ON REAL ESTATE.**

Common Pleas Court of Montgomery County.

JOHN L. FERGUSON, AS EXECUTOR OF THE ESTATE OF MARY E.
SEAL, DECEASED, v. LEWIS E. WENTZ ET AL.

Decided, May 4, 1917.

*Wills—Personalty Insufficient to Pay Debts and Costs of Administration
—Legacies Not Payable out of Proceeds from Sale of Real Estate,
When—Sections 10774 and 10817.*

Where a testator's personalty is not sufficient to pay his debts and costs of administration and the legacies provided for in his will are not made a charge on his real estate, proceeds from sale of realty do not fall into the residuum but pass to the heirs, and the legacies fall for want of a fund out of which they may be paid.

Murphy, Elliff & Lean, for heirs.

Lenz, Sigler & Denlinger and *William H. Pohlman*, for legatees.

SNEDIKER, J.

In this case there is submitted for our determination the remaining question as to the construction of Item 9 of the will of Mary E. Seal. After providing for the payment of all her debts and of her funeral expenses, this testatrix, by items second, third, fourth, fifth, sixth, seventh and eighth, bequeathed to different persons in the several items named personal property and money.

Item ninth reads:

"If after the payment of the several bequests above mentioned there is a remainder left, I direct that my executor pay to Lewis E. Wentz, Mollie Marshall and Della Chase, share and share alike."

It appears from the averments of the petition :

“That decedent at the time of her death was the owner of personal property sufficient in amount to pay the costs of administration, valid claims against her estate and legacies; that she died seized in fee simple of certain real estate, and that no specific testamentary disposition was made of the same; that some time after her death another claim was presented and allowed and thereby a deficit was created and the personal property was insufficient to pay the costs of administration, debts and legacies; and therefore, to-wit, on the 21st day of September, 1916, an action was commenced in the Probate Court of Montgomery County, Ohio, to sell said real estate to pay said debts and legacies.”

These averments are admitted by the answering defendants who are heirs of testatrix.

The claim is made by counsel for Lewis E. Wentz, Mollie Marshall and Della Chase that any balance arising from the sale of the real estate by the executor under the authority of the probate court ought to be paid under item ninth to the residuary legatees. The answering defendants, heirs of testatrix, claim that it should be distributed to them.

As there was at common law no right on the part of an administrator or executor to sell the real estate of the decedent, any action taken by the probate court or by an executor with its permission must be strictly within the terms of Section 10774 of the General Code or the terms of Section 10817 hereafter quoted.

Except under the provisions of these sections, neither the probate court has the authority to authorize nor the executor the right to make a sale of the real estate of the testatrix. Section 10774 is as follows:

“As soon as the executor or administrator ascertains that the personal estate in his hands will not pay all the debts of the deceased, with the allowance to support the widow and children for twelve months and the charges of administering the estate, he must apply to the probate court or court of common pleas for authority to sell the decedent's real estate.”

If, as we are unable to determine from the petition, the debts of decedent and the charges of administration would so exhaust

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the personal property as to preclude the payment of any one or more of the specific legacies found in the will, there being no charge found in the will of these legacies upon the real estate, the probate court has no authority to authorize the sale of the real estate for the purpose of paying these specific legacies, and such unpaid legacies would fail for lack of a fund out of which they could be met.

“The general rule is that the personal estate of the testator supplies the fund out of which legacies and debts are to be paid, unless it clearly appears from the will that the testator intended otherwise. In the absence of anything in the will to indicate an intention on the part of the testator that a legacy shall be a charge upon the real estate or paid out of the proceeds thereof and there is a deficiency in the personal estate, the legacy abates in whole or in part.” *Thompson on Wills*, Section 320.

Section 10817 of the code provides:

“When a testator has given a legacy by a will that is effectual to pass or charge real estate and his personal estate is insufficient to pay such legacy together with his debts, the allowance to the widow and children and the cost of administration, the executor or administrator with the will annexed may be ordered to sell his real estate for that purpose in the manner and upon the terms and conditions described herein for the payment of debts.”

It will be observed that throughout this will there is no mention of the realty of this estate; nor in the residuary clause does this testatrix after giving these certain legacies devise her real estate. So that there is no blending together of the real and personal estate as one estate; and the rule which follows such blending in a residuary clause that an implication is justified that the testator intended, in case of a failure of his personal estate, to make his legacies a charge upon the realty does not apply. The direction of the residuary clause is “to pay,” indicating, in view of the fact that the real estate is not mentioned or referred to in the will, an intention on the part of the testatrix that the remainder of her personal estate, after paying her debts, funeral expenses, costs of administration and the bequests found in the will, shall be divided among the three persons named in the residuary clause.

The real estate does not vest in the executor under the terms of this will. Upon the death of this testatrix, her real estate descended to her heirs, subject to the payment of debts if there be a deficiency of the personal estate. The executor has no right to enter into the lands or to take the profits; he has no interest in them but a naked authority to sell them on license to pay the debts where the personal estate is insufficient. It is because the lands are not liable at common law for the payment of debts that they are made liable by the section of the code referred to. If it were necessary to sell the land for the payment of debts, then Section 10816 of the General Code would apply.

“Section 10816. In all cases of a sale by an executor or administrator of part or the whole of the real estate of the deceased under an order of court, whether such executor or administrator has been appointed in this state or elsewhere, the surplus of the proceeds of the sale remaining on the final settlement of the account must be considered as real estate and be disposed of accordingly.” Also see 65 O. S., p. 86.

If the real estate has been in fact already sold, which does not appear from the petition, since we have found that by the terms of this will testatrix's real estate is not directed to be sold for the payment of these legacies nor are such legacies made a charge upon the real estate, the proceeds ought not to be regarded as falling into the residuum so as to be paid to the three residuary legatees named in item ninth. If the sale of the real estate has not yet been made, the property should not be disposed of except under the provisions of the sections heretofore referred to.

An entry may be drawn accordingly.

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INVALIDATION OF CONTRACTS AFFECTING FOREIGN CORPORATIONS FOR FAILURE TO COMPLY WITH REGISTRATION STATUTES.

Common Pleas Court of Franklin County.

INTER STATE VACCINE COMPANY V. ELMER E. REDMAN.

Decided, February 15, 1917.

Corporations—Effect of Failure by Foreign Corporation to Register—Provision of the Statute Rendering Contracts With Such Companies Invalid—Not Applicable to Unilateral Contracts—Character of the Contracts Entered into by Foreign Corporations upon Which Citizens of This State May Bring Suit.

Section 5508, General Code, invalidating every contract affecting the liability of a foreign corporation rendering it wholly void preventing suit thereon when such corporation fails to comply with the registration statutes, does not have reference to and make void unilateral contracts, those upon which there remains only the obligation of payment. On the contrary, it has reference to contracts on which citizens of this state may bring suit. A contract affecting the liability of a foreign corporation may be invalidated under the statute when its full terms give a right to the foreign corporation to bring action thereon, in which case the citizen of the state may claim that the contract affects the liability of the corporation; and not having complied with the registration laws it may not maintain its action, its contract being rendered wholly void.

O. H. Mosier, for plaintiff.

C. P. McClelland, contra.

KINKEAD, J.

Plaintiff is a foreign corporation. It alleges compliance with Sections 178 and 179 of the General Code, and that it has been qualified and authorized to do business in Ohio. It alleges that in July, 1915, it sold to the defendant f. o. b. Kansas City, Mo., a car load of hogs consisting of 187 in number and weighing 28,090 pounds, for which defendant agreed to pay

eight cents per pound. It avers compliance of the contract by it, and seeks to recover the sum of \$2,247.20 claimed to be due thereon.

Defendant sets up as his first defense the claim that the contract of sale was entered into and executed in the state of Ohio, and that both parties intended the same to be carried out and completed in this state; that at the time of entering into the contract plaintiff was not engaged in interstate commerce, and was not entirely non-resident, soliciting business by correspondence and by traveling salesmen; but that it was a foreign corporation organized for profit, doing business and owning and using part of its capital within the state, etc. It is averred that it was doing business without having complied with the laws of this state, and that it had not procured from the Secretary of State a certificate authorizing it to do business.

Plaintiff submits a demurrer to this defense.

Defendant claims that the transaction is within the penalty prescribed by G. C. 5508, while plaintiff seeks to avoid its effect by averring that by an oral contract it sold to defendant at Kansas City, Mo., a car load of hogs for which defendant agreed to pay the sum of eight cents per pound; that it loaded and shipped the hogs from Kansas City to the defendant at Columbus, Ohio.

Plaintiff avers that as a foreign corporation it complied with Sections 178 and 179, which concedes that it is subject to such provisions, and admits that it had not complied therewith at the time the contract of sale was made.

It seeks to avoid the provisions of Section 5508 by stating facts which will make it appear that the contract was fully executed outside of Ohio, and that nothing remained but an obligation of payment or payment and delivery. Plaintiff relies upon *Catlin & P. Co. v. Schippert*, 130 Wis., 642, where it was held that the words of a similar statute of that state containing the words, "affecting the *personal* liberty," were construed to exclude all unilateral contracts, like bills, notes, and contracts that were fully executed outside Wisconsin upon which

there remains as obligations only payment, or payment and delivery to be made in that state. Such transactions were considered as constituting acts of commercial intercourse and hence, as between the parties an act of interstate commerce.

The contention of counsel for plaintiff is that a foreign corporation, subject to our registration laws, may carry on interstate transactions and interstate commerce without being subject to any penalty, and that the principle of the Wisconsin rule applies.

The dictum of Wisconsin decisions under similar statute is that contracts affecting the personal liability of foreign corporations do not include all contracts for the breach of which the corporation would be liable in damages or otherwise. The courts of that state hold that a contract which does not by express covenant or stipulation contained therein affect the personal liability of the corporation does not become subject to the statute even though the foreign corporation is otherwise subject to the registration statutes and has complied therewith. *Catlin v. Schippert*, 130 Wis., 642.

The Wisconsin decisions recognize the right of foreign corporations, although complying with registration laws, to still enter into the class of excepted contracts that may be interstate transactions, without being subject to the penalty of the statute.

The averment of the petition of sale to defendant "f. o. b. Kansas City, Mo.," is construed to evidence a sale for shipment. *Tustin Fruit Ass'n v. Fruit Co.*, 53 Pac., 693, 697 (Cal.).

It is held that a contract for sale of fruit at "three cents per pound f. o. b. Haywards, is to be construed as showing that the price was to be paid or become due when the fruit was delivered to the carrier at Haywards." *Blackwood v. Packing Co.*, 76 Cal., 212; 9 Am. St., 199.

In mercantile parlance, it means "free on board" and that the goods are delivered to the carrier at the place named free of drayage charges. *Muskegon C. R. Co. v. Mfg. Co.*, 135 Pa., 132.

In *Dannemüller v. Kirkpatrick*, 201 Pa. St., 218 (1902), it is held that:

"In the absence of an agreement to the contrary, when a vendor sells goods to a vendee residing at a distant place, a delivery of the goods to a carrier for transportation is a delivery to the purchaser, and especially is this true when a bill of lading naming the purchaser as a consignee is transmitted to and received by the purchaser. The delivery to the carrier vests the title to the property in the purchaser, and the risks of transportation must be assumed by him."

The rule, however, does not obtain where the parties have otherwise stipulated.

The court further points out that if it be the intent of the parties that delivery is to be made at the destination, then delivery to carrier will not divest the title of the vendor, nor pass it to the purchaser, until it reaches the place of destination.

It may then become a question of where delivery is to be made and when the title is to pass.

If the facts are in dispute it is a question of law; if not in dispute it is then for the jury.

Our sales statute, Section 8426, covers this point.

On the facts alleged in the petition it would appear that delivery was at Kansas City, and hence title passed to defendant at Kansas City, Missouri.

It would thus appear to be an interstate transaction, an act of interstate commerce.

That a foreign corporation, though subject to registration under our foreign corporation regulation, whether registered or not, may nevertheless engage in interstate transactions and enforce them in this state, there seems no doubt. It may, therefore, sue and recover on interstate contracts, without being subject to our statutes.

Doing business in this state as contemplated by our statutes of registration comprehends business transactions that are subject to such laws.

Transactions that are not entered into by reason of and on account of owning and using part of the corporate property

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of such foreign corporation, such as an act of interstate commerce can not be subjected to the penalty of our laws.

The matter submitted being the demurrer to the first defense our consideration is to be confined to the facts alleged therein.

Defendant avers that the contract of sale was entered into in Ohio, and that both parties intended the same to be carried out and completed in this state. It is averred that at the time of making the contract plaintiff was not engaged in interstate commerce.

The averment that the contract of sale was entered into in Ohio, is a conclusion.

The first defense does not state sufficient facts to show the *locus* of the agreement, nor where delivery was to be made, nor any facts showing agreement that delivery f. o. b. Kansas City was not the place where title passed.

Nor does averment of the fact that plaintiff owns and uses part of its working capital in Ohio, and that it was doing business in this state, go to the claim of plaintiff that the contract of sale was f. o. b. Kansas City, Missouri.

Demurrer operates only upon admitted facts. But it will search the record and notice specific admissions by the pleader, which are inconsistent with facts pleaded as a separate defense.

For example in the second paragraph of the second defense, defendant states:

“further answer defendant admits that on or about the 10th day of July, 1915, under an oral contract of sale plaintiff sold to this defendant f. o. b., Kansas City, Missouri, one car load of hogs consisting of 187 in number, for which the defendant agreed to pay the sum of eight cents per pound within four months from date of shipment.”

Then follows as an unauthorized improper form of denial:

“And further answering said defendant denies each and every allegation in said petition contained not herein specifically admitted to be true.”

The above admission is a complete admission of plaintiff's claim in its petition, and is wholly inconsistent with the first

defense, as well as the facts stated in the second cause of action.

Defendant can not make the claim which he seeks to present without a general denial.

In the second cause of action in defendant's cross-petition there is pleaded an alleged contract of sale of hogs on a verbal contract for the purpose of feeding and fattening them for market, to be paid for when matured and sold, in which contract plaintiff verbally warranted the hogs to be clean, thrifty native stock and straight feeders, and that they had been vaccinated and were immune from cholera, etc. He then pleads a breach of contract of warranty and seeks recovery of damages.

If defendant claims the contract set up by him was the real contract—the whole contract—then he should not have admitted the contract alleged by plaintiff, his qualified denial not serving any purpose whatever.

If defendant does claim the contract set up in his second cause of action to have been the contract made, he should have entered a general denial under which he could claim that the contract pleaded by plaintiff was not the contract, and which would enable him to set up the complete contract, as claimed in the second cause, and to show that the amount claimed by plaintiff was not due.

The first defense states that the

“said contract described in said petition was entered into and executed in the state of Ohio,” etc.

It fails to state facts therein showing it not to be a contract of sale f. o. b. Kansas City, Missouri, as alleged in the petition. A claim that the contract was entered into in Ohio is in the nature of an argumentative denial.

Each defense must be complete in and of itself. The defense demurred to must set out what defendant claims the real, complete contract to have been. There should be neither a qualified nor argumentative denial.

Defendant either did, or did not enter into the contract f. o. b. Kansas City, Missouri.

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His defense in which he seeks to state facts to show that the contract actually made is subject to the penalty of Section 5508 must not only be full and complete in itself, but it must disclose a contract made by plaintiff while doing business in this state, and that it was not an interstate transaction.

With the qualified admission of the contract alleged by the petition, and an unauthorized form of denial under which the court will not undertake to ascertain precisely what is admitted and what is denied the defense fails to withstand the attack by demurrer.

Suppose it be assumed that it is an Ohio contract, and that it was made prior to actual compliance by plaintiff with Sections 179 *et seq.*, does it become subject to a penalty under General Code, Section 5508, which provides that:

“Every contract made by or on behalf of any such foreign corporation, affecting the liability thereof, or relating to its property within this state, before it shall have complied with the provisions of section one hundred and seventy-eight of the General Code, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them.”

The intent of the statute, no doubt, was to penalize a foreign corporation by rendering void a contract made by it without compliance with Section 178, thus preventing it from bringing action thereon.

Every contract made on its behalf, *affecting the liability thereof* shall be wholly void on its behalf.

Any contract made by the corporation in its own behalf upon which it might have occasion to sue, to vindicate its rights would have relation to the liability of the defendant, not its own.

Any contract on which a citizen of Ohio would have occasion to bring suit against the corporation would affect the liability thereof.

It is difficult to perceive how any contract may be invalidated by the statute which affects the liability of a corporation, unless it be a contract which by its full terms may give right to the

corporation to bring action thereon against a citizen of Ohio, and under which contract defendant may have the right to counter-claim for breach.

In such case the contract affects the liability of both the Ohio citizen and the foreign corporation.

The contract as alleged in plaintiff's petition does not affect its liability. It is not subject to the penalty of Section 5508, and, therefore, is not void.

But, if on the other hand, the contract is not as claimed by plaintiff, but is that claimed by defendant, not in his first defense, but in his second cause of action, where a liability is alleged against plaintiff upon an alleged contract of warranty, it might then be claimed that there is a contract affecting the liability of the foreign corporation.

A similar statute in Wisconsin was construed to exclude all unilateral contracts, like bills, notes, and contracts fully executed outside that state upon which there remains only an obligation of payment. *Callin v. Schippert*, 130 Wis., 642.

"It is contended," says the court, "that the words: 'affecting the personal liability thereof' include all contracts for the breach of which the corporation would be liable in damages or otherwise. This construction is not permissible," etc.

And again it is stated that:

"the words 'affecting the personal liability' used in describing one of the prohibited classes of contracts, must be held to exclude all unilateral contracts, like bills and notes, all contracts fully executed outside of this state upon which there remains an obligation only payments, or payment and delivery, to be made in this state, and all contracts not by their stipulations imposing duties or liabilities on such foreign corporation. Because the contract in question was not, so far as it was made or took effect in this state, one affecting the personal liability of the plaintiff by any covenant or stipulation therein contained, and was wholly executed in New York and because it did not relate to property within the state, and did not constitute a transaction of business in this state, the plaintiff is entitled to recover thereon within the terms of the statute."

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The dictum of the opinion is to the effect that a contract which by its stipulation imposes duties or liabilities on such foreign corporation may be invalidated by the states.

If we assume that the contract to purchase the hogs was an Ohio transaction, and that in connection with, as part and condition thereof, plaintiff warranted the hogs to be of certain kind and quality and free from disease, then it may be urged that the warranty as an express provision imposing a duty and liability upon the corporation creates a liability.

If a contract of warranty was made, it is such as affected the liability of the corporation.

If every contract affecting the liability is wholly void on its behalf, does the statute mean that that part of the contract giving the corporation a right of redress against the citizen is void? The statute does not clearly so state.

Every contract affecting the liability shall be wholly void on its behalf, would have to be constructed to comprehend or mean that if a contract affecting its liability also conferred procedural right upon the corporation, such part of the contract is to be void, but the contract affecting its liability may be enforced against it.

The statute designed to invalidate only the part conferring rights upon the corporation, and still it states that a contract affecting the liability thereof is void. If the statute can be sustained and applied it is by resort to and construction of the words *contract made on behalf* of any foreign corporation *shall be wholly void on its own behalf*, and not by any reliance upon *every contract* of a foreign corporation *affecting the liability thereof*.

Liability means amenability and responsibility to law (*Wood v. Currey*, 57 Cal., 208, 209). Liability contemplates a condition that gives rise to an obligation to do a particular thing. *Haywood v. Shreve*, 44 N. J. L., 94, 104. Liability is responsibility (*McElfresh v. Kirkendall*, 36 Iowa, 224, 226; *Lattin v. Gillette*, 95 Cal., 317). Liability has reference to responsibility in tort, as well as in contract. *Miller v. Land Co.*, 134 Cal., 586.

If the words affecting the liability were to be the determinate factor in its construction, the statute would be meaningless.

If the contract affects the corporate liability as well as being one made on its behalf which confers upon the corporation a right to sue, then if the penalty attaches it could not enforce the contract in its favor, but the other party could enforce the liability of the corporation.

The language of the statute is unfortunate, and not clear and definite.

In considering the demurrer to the first defense, cognizance can not be taken of the contract alleged in the second cause of action which may be surmised to be defendant's version. But as already stated defendant has admitted that the contract described in the petition was entered into in Ohio, and was to be there carried out. Under such state of pleading, without complete denial that the contract pleaded by plaintiff was the contract, and without all the essential facts being stated in the first defense, it is clear that the penalty of Section 5508 can not be invoked.

The claim of alleged contract and breach of warranty made in the cross-petition presents a novel question. Without proper correction of the pleading as indicated it can not be fairly raised.

Legal ideas concerning breaches of warranty and the nature of a cause of action thereon are somewhat obscure.

Warranty has been used in such a great variety of senses, and the decisions have been so anomalous, that it is said that an attempt to arrive at a satisfactory conclusion about any principle supposed to be settled by them, would be hopeless if not absurd. *McFarland v. Newman*, 9 Watts., 55, 34 Am. Dec., 497; *Oil Co. v. Vuchanan*, 120 Fed., 906, 57 C. C. A., 498.

It is said to be an agreement which refers to the subject matter of a contract, but not an essential part of it (40 Cyc., 492); an express or implied statement of something which the parties undertake shall be a part of the contract, and yet collateral to the express object of it (40 Cyc., 492-93). An indemnity against failure of performance (*Id.*). It is used in the law of sales of

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personal property, to indicate a collateral undertaking on the part of the seller as to quality or condition. (*Id.*) Equivalent to a condition precedent. It is used as an express promise as to quality which is a condition until the sale is executed, and a warranty after it is executed. 40 Cyc., 493, N. 23.

If the warranty be not regarded as part of an express contract, as not an essential part of it, merely having reference to the subject-matter of a contract or as an independent condition, then it may be difficult to square such a claim with the penalty of Section 5508.

The pleadings should definitely clear up the *locus* of the contract, and the place where the cause of action accrued whether in Missouri or in Ohio.

Another question occurs to me concerning the cause of action. A right of action is property as if it were a corporeal possession. *Power v. Harlow*, 57 Mich., 107 (1885); *Gibson v. Gibson*, 43 Wis., 1, 28 Am. Rep., 527.

There is no doubt that a right of action, where it comes into existence under common law principles and is not given by statute as a mere penalty or without equitable basis, is as much property as any tangible possession, and as such within the rules of constitutional procedure. *Dunlap v. Ry.*, 50 Mich., 470, 474.

The term "property" includes a cause of action. *Seaman v. Clark*, 69 N. Y. Supp., 1002, 1004, 60 App. Div., 416. It is as much property as a corporeal possession. *Power v. Harlow*, 57 Mich., 107.

The demurrer to the first defense is sustained.

The court of its own motion orders that the denial of each and every allegation not admitted to be true be stricken out.

That defendant make it definite and certain whether he admits or denies that he made the contract alleged in the petition.

That he make it definite and certain in his alleged second cause of action, whether he undertakes to set forth what he claims to have been the full and complete contract, and whether he admits or denies the contract alleged by plaintiff.

It has been stated that defendant should file a general denial and then plead its version of the contract. Of course I am not fully informed of the exact claim defendant makes. It might be that specific denials and new matter should be the course adopted.

This is one instance where the vice of using an unauthorized form of denial plainly appears. The tools provided for by the code are much more effective than some form not provided by it. A party defendant is not required to admit allegations made by plaintiff. If there be no general or specific denial of matter alleged by plaintiff, of course it is admitted. Counsel oftentimes are better off not to undertake to make admissions; sometimes the effect of their admission is detrimental. This case is a striking instance of that fact. I have observed others that haunted counsel at and during trial. General denial can not often be made. This seems an appropriate case for its use, but when that plea can not be resorted to, the specific denial is much more effective than the common form of denial of each and every allegation not admitted or denied, which is not authorized by the code and should no longer be tolerated.

I hope the spirit will be appreciated when I jocularly remark that I have made much more headway in lecturing law students than I ever expect to make in my present capacity.

I think it just as objectionable to take up so much space in repetition of matter pleaded by the other side by admission of many allegations made by the adversary. "Let the judge do it"; that is, counsel should not admit anything but should specifically deny all that the pleader does not admit, and let the burden rest on the judge to discover what is admitted by failure to deny. This will be more effective.

The code does not require, nor authorize a party to enter a plea of admission; it merely provides for a general or special denial and plea of new matter. If I were to advocate reforms in the code, I would recommend quite a number of "Thou shalt nots" commandments, leaving the code as it is. The

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“shalt nots” would consist in injunctions not to violate the provisions of the code.

Counsel have asked that some consideration be given the entry in the other case recently before the court. In case No. 71,154 the plaintiff brought suit in replevin under a chattel mortgage taken by it on the hogs sold to defendant for the value of which this action is brought.

The court sustained a demurrer to the reply, and searching the record ordered that the case be dismissed.

On re-examination of the question involved in that case and considering the claims therein made in the light of the conclusions reached in this case, some suggestions are made which ought to meet the approval of both parties.

It is of course not proper to have two separate actions pending or having relation to the same action.

Plaintiff might have pursued different courses. It could have sued for the amount due on sale of the hogs; or it might sue in replevin; or it might sue for the value of the hogs, and to foreclose the chattel mortgage, as separate causes in the same action.

But it should not be allowed to subdivide its claims by bringing two separate actions as has been done.

Plaintiff makes the same claim in case No. 71,154, as in this one, that the chattel mortgage was given in consummation of a contract entered into in the state of Missouri.

I think it best to consolidate the two cases. The judgment of dismissal should be entered and defendant's cross-petition in that case should be incorporated in this case, when the answer and cross-petition is amended.

COSTS IN ACTIONS BASED ON INJURY BY A MOTOR VEHICLE

Common Pleas Court of Clark County.

HIAL H. FREEMAN v. E. M. ELLSWORTH.

Decided, April Term, 1917.

Costs—Section 11625 Not Repealed by Implication—Each Party to Pay His Own Costs, When.

F, a resident of Clark county, Ohio, sues E, a resident of Fairfield county, Ohio, an owner of a motor vehicle, in the Court of Common Pleas of Clark County, Ohio, for injury to property under favor of Section 6308, General Code. Verdict is returned for plaintiff for five dollars.

Held: That Section 6308, General Code, does not repeal Section 11625 by implication and that each party to the action must pay his own costs.

Johnson & Lorenz, for plaintiff.

Olinger, Dieffenbach & Sites, contra.

STEPHENSON, J.

The present contention between counsel in this case is as to the payment of costs.

Plaintiff claims that Section 6308, General Code, repeals Section 11625, General Code, by implication so far as actions of this character are concerned.

Defendant claims that Section 6308, General Code, does not affect Section 11625, General Code, at all.

The court concedes that there is room for argument both ways. Section 10223, General Code, provides:

“Unless otherwise directed by law, the jurisdiction of justices of the peace in civil cases is limited to the township wherein they have been elected and wherein they reside. No justice of the peace shall hold court outside the limits of the township for which he was elected.”

That is a statute fixing generally the jurisdiction of justices of the peace.

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Section 11625, General Code, provides:

“If it appears that a justice of the peace has jurisdiction of an action brought in any other court and the judgment is less than one hundred dollars, unless the recovery be reduced below that sum by counter-claim or set-off, each party shall pay his own costs.”

Section 6308, General Code, provides:

“Actions for injury to a person or property caused by the negligence of the owner of a motor vehicle may be brought by the person injured against such owner in the county in which such injured person resides. A summons in such action against any defendant or defendants shall be issued to the sheriff of any county within this state wherein such defendant or defendants reside, and may be served as in other civil actions.”

This is the latest section and unless it repeals Section 11625 by implication such section applies to this case.

Statutory construction, particularly when the only question is as to repeal by implication, in Ohio, might be said to be reduced to an exact science.

Plaintiff in this action obtained a verdict against defendant for five dollars, and he claims that such a recovery carries all costs in the case.

Defendant, relying on Section 11625, General Code, which provides in effect that if the action could have been brought in a justice's court and wasn't, and the amount of recovery is less than one hundred dollars and such recovery was not reduced below said sum by counter-claim or set-off, each party shall pay his own costs.

The party who seeks to benefit by an implied repeal usually carries a heavy burden, as he must bring himself fairly and squarely within the rules laid down by the court of last resort.

The first rule is:

“A special statutory provision upon a particular subject supersedes and takes the place of a more general provision.” *Railway v. Commissioners*, 71 O. S., 454.

Section 6308, General Code, under which this action was brought, is a special statutory provision upon a particular sub-

ject. It deals exclusively with "Injury to a person or property caused by the negligence of the owner of a motor vehicle," etc.

But does this section affect Section 11625, General Code?

It is doubtful whether, under this section, a justice of the peace would have authority to issue summons to the sheriff of another county. That the safest course to pursue, since the Supreme Court has said that Section 6308 is constitutional (84 O. S., p. 283), it would be to institute the proceeding in the court of common pleas.

The second rule is:

"Repeals by implication are not favored, and before a statute is so repealed the repugnancy must be necessary and obvious, and if by any fair course of reasoning conflicting statutes can be reconciled, the law must stand. *State v. Cameron*, 89 O. S., 214.

"The court can not see that the provisions of Section 6308 are necessarily and obviously repugnant to Section 11625, but is of opinion that said sections can be easily reconciled. The court regards Section 6308 as cumulative—merely providing a new way of enforcing an old remedy by enlarging the process of the court. Litigants may make use of Section 6308 if they so desire, but if it were wiped off the statute books entirely a person injured in his person or property by the owner of a motor vehicle would not be without remedy."

The third rule is:

"Repeals by implication occur only when it results from the necessity of giving effect to the later legislation." *Henderson v. City*, 81 O. S., p. 27.

It is certainly not necessary to repeal Section 11625 in order to give effect to Section 6308.

The fourth rule is:

"Where two statutes are inconsistent, the court will reconcile them if possible."

The court is of opinion that these sections are easily reconciled, in fact, are perfectly harmonious, and so finds, and each party to this action will pay his own costs.

Plaintiff may have his exceptions.

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ACTIONS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Common Pleas Court of Hamilton County.

CHARLES OMIN V. THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.*

Decided, April 21, 1916.

Master and Servant—Action by Railway Employee Injured While Engaged in Interstate Commerce—Doctrine of Res Ipsa Loquitur Not Ordinarily Applicable to Such a Case—Nature of the Two Years Limitation—Effect of Acceptance of Other Employment and Subsequent Discharge Therefrom.

1. In an action for injuries under the federal employers' liability act the doctrine of *res ipsa loquitur* does not apply unless some compelling reason, such as positive negligence on the part of the master, makes its application necessary.
2. The provision of the federal employers' liability act, that suit thereunder must be brought within two years, is not a statute of limitations but a condition of the right accorded to bring an action.
3. An offer by the master to give to an injured employee suitable employment during the period of his disability and the acceptance of such offer constitute a complete contract, and the right of action for damages on account of the injury becomes merged in this contract, and the subsequent discharge of the employee does not revive his original action for tort but remits him to one for damages for breach of the contract.

Bettinger, Schmitt & Kreis, for the motion.

Harmon, Colston, Goldsmith & Hoadly, contra.

GEOGHEGAN, J.

Heard on motion for a new trial.

This was an action for damages for personal injuries under the federal employers' liability act. The plaintiff was employed by the defendant as a laborer around the freight house,

*Affirmed by the Court of Appeals, *Omin v. Railway*, 27 C.C.(N.S.), 142. Motion for an order directing the Court of Appeals to certify its record in this case overruled by the Supreme Court, June 26, 1917.

engaged in the business of trucking freight from the freight depot into cars for the purpose of transportation. On the 17th day of March, 1912, while engaged in the performance of his duties he was injured by the falling of a crate, which was about eight feet long, one foot wide and one foot in depth. This crate stood on end in the car in which the plaintiff had come during the course of the performance of his duties. There is no evidence as to what the crate contained, as to who put it there, and no evidence that there was anything that could cause the crate to fall. The plaintiff had gone into the car, had deposited the freight that he was carrying on a hand truck, and as he turned around to go out of the car this crate fell down and struck him.

At the conclusion of the plaintiff's case a motion to direct a verdict for the defendant was granted, and this action of the court is now claimed to have been erroneous.

The plaintiff contends that the doctrine of *res ipsa loquitur* is applicable to cases arising under the federal employers' liability law, and cites in support of that proposition the case of *Ridge v. Norfolk Southern R. R. Co.*, 83 S. E., 762, a case decided by the Supreme Court of North Carolina.

In that case a railroad employee was injured while on the top of a box car in a train, caused by the roof of the car being blown off. There were fifteen box cars in the train and the roof of the car upon which the employee stood was the only one blown off. The velocity of the wind at the time was not so great that the employee could not stand on top of the car without difficulty. The court held, under these circumstances, that this was an accident such as in the ordinary course of things does not happen if those having control of the car and the duty to inspect it use proper care, and in the absence of satisfactory explanation by the defendant the accident can be presumed to have arisen from the want of proper care. The court, in that case, at page 767, in discussing the doctrine laid down in the case of *Patton v. Railroad*, 179 U. S., 658, wherein it was held that the doctrine of *res ipsa loquitur* is not recognized in cases between master and servant, say that the rea-

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son for depriving a servant of the benefit of the doctrine no longer exists, and further say:

“Those cases which deny the applicability of the doctrine in an action by a servant against his master proceed upon the theory that the injury may be referred to the negligence of a fellow servant, or to contributory negligence of the plaintiff, with just as much reason as to the negligence of the master. Under the employers’ liability act the defense of the fellow-servant doctrine is excluded, as is that of contributory negligence to some extent. Hence the reason for the law, as thus stated, having ceased, the rule ceases.”

This reasoning is not persuasive. The court’s view as to the theory upon which the rule laid down in the Patton case is founded is not borne out by the authorities. The doctrine of *res ipsa loquitur* is to a great extent founded upon the fact that the evidence as to the true cause of the injury, whether culpable or innocent, is accessible to the party charged and perhaps inaccessible to the party injured. So that, where an accident happens, that in the ordinary course of events does not happen, the laws call upon him under whose control the thing which caused the accident may have been to explain, rather than upon him who has no control over the cause; but inasmuch as the servant is ordinarily in as favorable position as the master to know and explain the cause of the accident, the presumption as to negligence arising from the happening of the particular event does not ordinarily arise in cases between them. This seems to be the true reason why the federal courts have refused to apply the doctrine as between master and servant.

Now in this case there is no evidence to show that anything was done to cause the box or crate to fall, and unless some inference of negligence can be drawn from the very fact that a box of that kind and character was permitted to stand in a freight car without any evidence as to how it was put there or as to its contents, then the plaintiff’s case must fail because of the absence of proof of negligence.

As pointed out, it has been repeatedly held by the federal courts that the doctrine of *res ipsa loquitur* does not apply as

between master and servant. *Canadian Northern Ry. Co. v. Senske*, 201 Fed., 637; *Patton v. Texas & Pacific Ry. Co.*, 179 U. S., 658; *Armour & Co. v. Harcrow*, 217 Fed., 224. And the question as to what creates a liability under the federal employers' liability act must be determined by the rules laid down by the federal courts. *Seaboard Air Line Ry. v. Horton*, 233 U. S., 492; *Central Vermont Rd. Co. v. White*, 238 U. S., 507.

While it is true in some federal cases it has been said that there is no hard and fast rule with reference to the applicability of the doctrine of *res ipsa loquitur* as between master and servant, nevertheless, in those cases there was some compelling reason for the court to depart from the general rule, such as, that the facts proved pointed to positive negligence on the part of the master in doing or failing to do some non-delegable duty. See *Lucid v. Dupont Powder Co.*, 199 Fed., 377; *American Shipbuilding Co. v. Lorenzi*, 204 Fed. 39.

There is another reason why the court was correct in directing a verdict in this case and that is that the action was not brought within two years after the cause of action accrued. The accident happened on March 17, 1912. The petition was filed on April 26, 1915, more than three years after the accrual of the cause of action. The federal employers' liability act provides that all actions brought under the act must be commenced within two years after the cause of action accrued, and the courts have held that this is not a statute of limitation but is a condition of the right to bring the action. This is conceded by counsel for plaintiff, but he seeks to avoid this bar by setting up in a reply that the defendant company, after the accident to the plaintiff, promised and agreed with him that if he would not bring suit it would provide him with such employment as his physical condition would permit of and take care of him as long as he was disabled, on account of such injuries, from performing the duties of his regular occupation, and that in pursuance of said promise and agreement said defendant did employ him for light work in and about the office of its depot master until about July 7, 1914, but that ever since said date, although the disability of the plaintiff on account of

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said injuries still exists, said defendant has refused to give this plaintiff employment, and counsel for plaintiff sets up these facts as an estoppel on the part of the defendant to plead the statute of limitations.

Assuming that the evidence is sufficient to support the allegations set forth in the reply, it does not seem to me that the plaintiff has brought himself within the rule which provides that wherever one has caused another to refrain from bringing an action for personal injuries by promising a settlement, either in the shape of money or employment, the promisor is estopped to plead the bar of the statute. I have examined carefully all the cases and I find that almost without exception in the cases that lay down that doctrine there was a promise and a subsequent failure to carry out the promise. In this case, however, it is pleaded and proved that the plaintiff was given employment and that the employment lasted for a period of two years.

Therefore, it seems to be that inasmuch as there was an offer on one side to settle by the giving of employment, and the acceptance of said employment on the other side, that a complete contract was entered into and that the action for damages then became merged into the right secured by the contract. It would seem strange if one placed under circumstances similar to those under which the plaintiff herein was placed could accept the employment offered, and then, after a lapse of a period of years, by reason of a discharge on the part of his employer, revive the original action which he may have had for the tort, and thus sweep aside all questions as to whether or not he, by reason of his own conduct or actions, relieved the employer from any further duty to carry out the contract.

I think the rule ought to be that where the employee accepts, in settlement of his injuries, the promise of employment by the employer, and in pursuance of said promise the employee enters upon the employment of the master and is subsequently discharged, the tort is merged into the promise and the action then becomes one, not for the tort, but for the breach of the contract, where the master will have such defenses as may be available to him in actions of similar nature.

The question as to estoppel to plead the statute of limitations for personal injuries was carefully considered in the case of *Klass v. City of Detroit*, 129 Mich., 35, and after a careful review of all the leading authorities on the subject the court in that case lays down what seems to be the correct conclusion, in the following language:

“An estoppel to plead the statute of limitation can only be founded on conduct naturally calculated to induce plaintiff into a belief that his claim would be adjusted if he did not sue.”

Now there is no claim here in the reply, nor does the evidence show, that the defendant promised plaintiff that his claim would be adjusted if he did not sue. The most that can be made out of the proof offered in support of the allegations of the reply is that if he did not sue plaintiff would be given a position that he would be able to fill until he had fully recovered from his injuries. He received such a position and entered upon the work.

I am aware that the case of *Chesapeake & Nashville Ry. v. Speakman*, 114 Ky., 628, seems at first blush to be contrary to the view I have taken. However, in that case the promise was alleged to have been that if plaintiff would not sue his time should be allowed to run on, and his wages paid until he recovered; also that he would be paid by appellant for his injuries when time showed what their extent was; and he should have in its service a permanent position as long as he lived, or as long as the superintendent remained on the road. The court held that this conduct tolled the running of the statute of limitations and that the railway company was estopped to set it up. However, it will be observed in this case that part of the promise was to compensate him for his injuries; in other words, to pay him for that for which he might have sued; and therefore the rule laid down is entirely in accord with the rule laid down in the case of *Klass v. City of Detroit*, *supra*.

In the case at bar there was no promise to compensate him for his injuries, the testimony being simply to the effect that he was told that he had better take a job rather than sue. That

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his cause of action, under the circumstances, would be one for damages for breach of the contract would seem, inferentially at least, to be supported by the cases of *Hopperton v. Railroad Co.*, 17 Ky. Law Rep., 1322; and *Lake Shore & Western Ry. v. Tierney*, 8 C.C.(N.S.), 521.

Therefore, the motion for a new trial will be overruled.

STOCKHOLDER'S RIGHT TO INSPECT BOOKS OF COMPANY.

Superior Court of Cincinnati.

JAMES H. RATCLIFF V. AUTO REMEDY CO.

Decided, May, 1917.

Corporations—Right of Stockholder to Inspect Books—In No Way Depends on His Motive or Purpose—Allegations Warranting Injunctive Relief.

1. A petition which discloses that the plaintiff is a stockholder in the defendant company and that he has requested the defendant corporation to permit him to inspect the books and records of the company and to fix a reasonable time for so doing, which allegations are admitted by the company which has refused the request, states a cause of action justifying an injunctive order allowing such inspection.
2. Where a suitor demands opportunity for the exercise of a clear right given him by law, his motive for such action is not a proper subject for judicial investigation, whether the remedy be legal or equitable.

Nelson B. Cramer, for plaintiff.

Gaynor & Harding and *F. S. Starkey*, contra.

GUSWEILER, J.

This is an action for an injunction under Section 8673, General Code, asking for a mandatory order to inspect the books, records, etc., of the Auto Remedy Company by the plaintiff, a stockholder in the defendant corporation.

The defendant corporation answers alleging bad faith, etc., on the part of plaintiff stockholder in his desire for said inspection. The issue is on the motion of defendant for judgment on the pleadings. The plaintiff contends that he is not required to reply or controvert the allegation of "bad faith," etc., and that defendant's answer should be disregarded as not setting up a legal defense.

The language of the statute is plain and the right given the stockholder to inspect the books and records of the corporation at all reasonable times is clear. One condition, and one only, is attached, to-wit, that the right can be exercised only at reasonable times. The motive or purpose of the party who is in the exercise of or is about to exercise a clear legal right, is unimportant. *Letts v. Kessler*, 54 Ohio St., 73; *McDonald v. Smalley*, 26 U. S. (1 Pet.), 620 [7 L. Ed., 287]. No reason is apparent why the rule should not apply in the instant case. We are of the opinion that when a suitor demands the enforcement of a clear right given him by law, whether the remedy be legal or equitable, his motive for such action is not a proper subject for judicial investigation. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St., 189; *American Shipbuilding Co. v. Whitney*, 19 C. C. (N.S.), 584; *Mitchell v. Rubber Reclaiming Co.* (N. J. Eq.), 24 Atl., 407. The petition states a cause of action not denied by the defendant warranting the granting of equitable relief.

A proper order will be allowed.

PUGH, J., and MERRELL, J., concur.

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**CHILD OF TENANT FARMER INJURED BY FALL OF
BARN DOOR.**

Common Pleas Court of Trumbull County.

CLYDE W. BURTON, BY NEXT FRIEND, v. S. K. LEITER.

Decided, 1917.

Negligence—Proximate Cause Not Necessarily the Direct and Immediate Cause—Remote Act in Point of Time—Concurring at Time of the Injury With a Second Act—May be the Immediate and Efficient Cause of the Injury—Criticism of the Expressionless Statement that the Question of Proximate Cause is Ordinarily One for the Jury.

1. Where property is out of repair and in a ruinous condition, and at the time of leasing, as well as after possession taken by the lessee, the lessor promises to repair, and injury occurs to a child of the tenant from the failure of repair, the lessor is liable therefor. (*Shindelbeck v. Moon*, 32 O. S., 264, 267.)
2. Where an intervening cause contributes to such injury resulting from the use of the premises, and such as might be naturally and probably be produced by the neglect or omission to repair the same, and one which in the light of all the circumstances could and should have been foreseen as likely to occur, the same is to be regarded as the proximate cause of the injury.
3. The conception that the proximate cause of the injury is necessarily the direct and immediate producing cause of injury correctly states the legal doctrine, where the intervening cause is one which in the light of all the circumstances should have been foreseen as likely to occur. In such case the prior or antecedent act and not the one nearest in point of time, is to be regarded as the direct and immediate cause of the injury. (*Stockberger v. Ames Shovel & Tool Co.*, 21 C.C.(N.S.), 424, distinguished; *Railway v. Rippon*, 8 C.C.(N.S.), 334, and *Lang v. Railway*, 7 C.C.(N.S.), 405 followed).
4. When ultimate facts stated in petition disclose that the party responsible for an antecedent or prior act should have foreseen an intervening act as likely to occur, the prior act is to be regarded as the direct and immediate cause of injury; therefore, demurrer to petition should be overruled.
5. Whether the antecedent or prior act of negligence, or the intervening act is to be regarded as the direct and immediate cause

of injury, is to be determined by the fact whether the one responsible for the first act may reasonably have foreseen that the second or intervening act should, could or would probably or reasonably have been foreseen.

Filius & Filius, for plaintiff.

Warren Thomas, contra.

KINKEAD, J. (sitting at Warren). .

This is an action by plaintiff, an infant seven years old, by next friend, for personal injury.

Plaintiff's father leased a farm from defendant and was occupying the same with his infant son and his family at the time of injury to plaintiff. The premises were out of repair when leased; that is, the barn doors upon the barn thereon leading into the cow stable were out of repair; the doors were hung on rollers which ran upon tracks, so that they were pushed back and forth upon the rollers when being opened and closed; these rollers were both out of repair prior and subsequent to the time plaintiff's father took possession. They were broken so that the doors could not be operated upon the tracks. In using them, the doors had to be lifted and placed against the side of the barn in order to open them. In closing them they had to be lifted back into place and supported in position; they could not be otherwise opened or closed.

Prior to making the lease, and to induce the father of plaintiff to take the premises, defendant promised and agreed to place the doors, rollers and track in good repair. Defendant also promised and agreed to make such repairs after the lease was made. Defendant reserved the right in the lease in writing to enter upon the premises to make the repairs.

Up to the 6th day of May, 1915, defendant had failed, neglected and refused to make the repairs and to put the barn doors in a reasonably safe condition for use; on that date some one attached a rope about the neck of a calf and tied the other end of the rope into a ring fastened to the barn sill. The rope was six or eight feet long. The ring to which the rope was attached was near to one of the doors which had then been

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opened and placed back against the side of the barn, leaning against it.

The calf having gotten its leg entangled in the rope, plaintiff was seeking to free it from its entanglement, and in doing so in some manner the barn door was pulled over, and fell upon the plaintiff. His left leg was broken.

Plaintiff claims that his injuries are wholly due to the carelessness and negligence of defendant in suffering and permitting the nuisance arising from carelessly and negligently failing to put the door in repair and in a reasonably safe condition, and asks damages in the sum of \$5,000.

Where property is out of repair and in ruinous condition, and at the time of leasing, as well as after possession taken by the lessee, the lessor promises to repair and injury occurs to a child of the tenant from the failure to repair, the lessor is liable therefor. (*Shindelbeck v. Moon*, 32 O. S., 264, 267.)

The facts stated in the petition present in novel form the question of proximate and remote cause. Being thus raised on demurrer it devolves upon the court to decide upon the admitted facts whether the proximate cause of injury to the boy was probably the neglect of defendant's obligation to repair the barn door, or whether the act of the one who tied the calf to the ring on the barn sill was an intervening cause, which should have been foreseen by the lessor as likely to have occurred in the natural and ordinary course of things; or whether such intervening cause could not have probably been foreseen and hence could not have been considered as a natural and ordinary result of the act or omission complained of. In other words, when the premises were leased to plaintiff's father, in the light of existing circumstances with the barn doors leading to the cow barn out of repair and the natural and probable uses of the barn, should defendant have foreseen that such an intervening cause as a calf being tied to the sill of the barn and becoming entangled in the rope, and while a small boy is undertaking to release the calf the barn doors are in some way pulled down in the melee because of their defective condition, thus injuring the boy?

Judicial expression concerning the relative function of judge and jury is not always clear and explicit.

There is a sort of halo about the common type of statement that the question of negligence or of proximate cause is under the circumstances one for the jury. In the present age of judicial progressive enlightenment and regard for the rights of persons, the predominant thought seems to be that the final conjecture or guess is within the province of the jury rather than of the judge.

The rule that where the facts are undisputed, and there can be but one rational, sensible conclusion, it is a question of law for the court, frequently must give way to the doctrine that the question of negligence, of contributory negligence, and of proximate cause, is under the circumstances one for the jury.

The mental attitude and perception of the judicial mind when instructing a jury concerning the law applicable to the different phases of the evidence and claims of parties must be fully comprehended.

All judges called upon to decide legal questions arising in a law suit must put themselves in the position of a trial judge.

Disputed facts or facts concerning which different minds may disagree only come within the exclusive province of the jury. When the facts and circumstances, though not in dispute, are of such character or nature that reasonable minds might arrive at different conclusions, then the question is one for the jury.

But the statement that the question of negligence, contributory negligence and proximate cause is under the circumstances one for the jury, does not fully state the rule. It does not furnish adequate guide for trial courts. It is not in fact a statement of any rule of law.

So it is expressionless to say that the question of proximate cause is ordinarily for the jury. 29 Cyc., 639. Likewise, it is inappropriate to say that where the negligence of two parties has contributed to an injury, it is a question for the jury to say whether the negligence of one or of the other was the proximate cause of the injury. 29 Cyc., 640.

The determination of the proximate cause as between two acts of concurring negligence present difficulty in many cases. Deci-

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sion of which act of two parties caused the injury must not depend upon mere conjecture. In all cases it can be determined upon reasonable probable grounds.

Trial courts submit disputed facts, and those concerning which rational minds may disagree, to the jury with appropriate instructions as to the law applicable to the different views of claims, so as to enable the jury to find the facts.

If rational minds may reasonably differ in determining the proximate cause, or if the ultimate fact may be definitely deduced from conflicting evidence, then it should not be decided by the court upon demurrer to the petition or upon motion for non-suit.

If it clearly appears upon demurrer to a petition from the admitted facts that the party committing the primary act of neglect could not in the light of all the circumstances have reasonably anticipated or foreseen the intervening act, then the court may apply the law to the rational and reasonable conclusion and decide accordingly.

Burket, J., in *Railway v. Murray*, 53 O. S., 570, 585, stated:

“If the evidence tends to prove that such negligence was the direct or proximate cause of the injury, it is for the jury; if the evidence does not so tend, a verdict should be directed for the defendant. Whether or not the evidence so tends is a question of law for the court, and not of fact for the jury.”

Under pressure of hurried disposition of cases, correct conception of the rule of proximate cause and its appropriate application is not always fully conceived.

Proximate cause is not nearest in point of time, and the designation of the legally producing cause as the direct or immediate cause may clearly and appropriately express the legal liability, if we keep in mind that the first act of neglect or omission may in the light of all the facts be the direct and immediate cause.

Of course two distinct acts of two persons must concur. And in point of time the second act is nearest, and ordinarily may seem more nearly direct and immediate. But the first act remote in point of time, still concurring at the time of injury

with the second act, may clearly and distinctly appear as the direct, immediate and efficient cause of injury.

Stockberger v. Ames Shovel & Tool Co., 21 C.C.(N.S.), 424, is a well considered and instructive decision in some respects. Without going into detail, it is apparent that the obstruction of the roadway by piles of logs on each side produced a continuing condition which "directly and immediately" at the time of injury prevented the driver of the team ahead of the runaway team from turning out in order to avoid collision with the team and wagon in front. The injury clearly resulted as a natural and probable sequence of piling the logs on each side of the roadway, thereby preventing free use of the whole road. The person piling the logs on each side of the road must be held to have reasonably anticipated such an occurrence as the runaway team and conflict with another vehicle, and inability to avoid injury.

The benefit to be derived from the case, however, is the criticism of language often used in charges to the jury, defining,

"proximate cause as the direct and natural, the direct and producing cause, without the existence of which such injury would not have occurred."

There is evidence of failure to appreciate the meaning and application of the expression of "direct and immediate cause of injury."

The court of appeals considered that:

"The proximate cause of the injury is not necessarily the cause which directly produced the injury, that is, the running away of the team, but it is that cause which from all the facts proved, an ordinarily careful and prudent person would say probably led to the final event as a natural sequence."

The court quotes and comments upon the opinion in *Meyer v. Ry. & Lt. Co.*, 116 Wis., 336. The Wisconsin court condemned the expression of the "direct and producing cause," etc., as incorrect, and scolded trial courts for not giving correct instructions of "this somewhat metaphysical conception of proximate cause" in view of all that court had said on the subject, adding:

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"It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause when it acts directly in producing the injury, or set in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor direct cause of the event. But such causation can not be proximate cause in law, unless an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the negligence under the circumstances."

The direct and immediate cause of injury must be regarded as the legal cause of injury, whether it be found that the original act or omission, or the intervening cause, be the producing cause.

A circuit court decision appears in the reports expressly approving the use of "direct and proximate cause," viz., *Railway v. Rippon*, 8 C.C.(N.S.), 334. The rule there stated was:

"A negligent act or omission to act becomes direct and proximate in relation to a claimed event, when the event is the natural and probable result of such negligent act or omission, and one which in the light of the circumstances would have been foreseen as likely to occur."

In *Lang v. Railway*, 7 C.C.(N.S.), 405, the charge above quoted was approved.

It seems reasonable to conclude that the adoption by the court of appeals of this county of the criticism of the Wisconsin court's criticism of the expression "direct and natural," "direct and producing cause" in order to draw the distinction in *Stockberger v. Ames Shovel & Tool Co.*, *supra*, was hardly justified or necessary. See common type of instruction given by capable men, *Ohio Instructions to Jury*, Sections 2106, 2107.

Coming to direct consideration of the demurrer, there are further rules to be applied.

To be a proximate cause of an injury, it is not essential that the one guilty of the first neglect must have anticipated the precise result. He is bound to anticipate the ordinary and prob-

able results, not extraordinary events, not unusual or unprecedented results. *Railway v. Rippon*, 7 C.C.(N.S.), 334.

When defendant leased the premises to the father of plaintiff with the barn doors in defective condition, he must be held to have anticipated such natural and probable events as might reasonably occur in the ordinary use of the barn and the doors. In the ordinary use of the barn the doors could only be opened in the manner alleged in the petition. Farmers ordinarily have children and calves. It would seem that there would ordinarily be occasion to tie a calf temporarily to a ring fastened in some part of the barn. Especially does this seem probable in view of the fact appearing in the petition that the doors out of repair led into the cow stable, where cows and calves may be kept. It is not extraordinary that a calf should cut up calfish pranks and become entangled in the rope holding it, nor is it unprecedented that a seven-year-old farmer's boy should be around the barn where a calf is tied and endeavor to release it from its entanglement with a rope with which it may be tied. And if it was naturally probable that an animal so tied would cause the barn doors in such defective condition to fall upon a boy in proximity thereto, that it may well be considered as a natural and probable result of failure to repair the barn doors.

Defendant was bound to anticipate that natural and probable uses of the barn might reasonably cause the doors to fall, and especially to injure a young boy unable to guard against injury as older person would be.

The demurrer to the petition is overruled. Leave is granted to answer within rule.

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EXPENSES OF DEFENDING A WILL.

Common Pleas Court of Preble County.

IN THE MATTER OF THE ESTATE OF WM. L. CURRY, DECEASED,
ON EXCEPTIONS TO ACCOUNT.

Decided, February 19, 1917.

Estates of Decedents—Expenses Incurred in Defending a Will—May be Charged Against the Estate, When—Success of the Defense Not a Determining Fact—Executor Must Act from Disinterested Motives and the Estate Must Receive Some Benefit.

1. An action to contest a will is a statutory proceeding controlled by the parties, the ultimate object thereof being to determine their rights to the property devised, and wherein the estate is not increased nor diminished nor affected by the result.
2. Under ordinary circumstances those claiming under the will are the proper parties to defend it when assailed, and as a general proposition an executrix is not called upon to engage in the contest and charge the estate with the expense thereof. If the beneficiaries make no defense and request or permit her to do so and she is successful, her right to credit in her account for expenses incurred is not absolute but will depend upon the circumstances of such particular case.
3. A circumstance of great weight is her interest or lack thereof in the result of the contest. If a devisee under the will, she is interested in sustaining the validity thereof and a presumption arises that she engaged in the contest in defense of her own personal interest, and because thereof she may not, if successful, charge the estate with her proper expenses unless it appear that she assumed the burden from disinterested motives and that her defense inured to the benefit of the whole estate.

*Risinger & Risinger and Chas. L. Hopping, for exceptors.
Elam Fisher, Lowry & King and Gottschall & Turner, contra*

BOWMAN, J.

This case is submitted to the court on exceptions to the account of Irma C. Ricker, executrix of William L. Curry, deceased.

The exceptions are to two items of credit claimed by the executrix in her account for fees and expenses paid attorneys for their services in successfully defending an action to contest the will of said deceased, one item representing the payment to Judge Elam Fisher and Lowry & King, and the other payment to Gottschall & Turner. They were disallowed by the probate court and executrix appeals.

Said services were performed by said attorneys because employed to do so. The contract with Judge Fisher and Lowry & King is in writing; that with Gottschall & Turner rests wholly in parol. It is established by the evidence, however, that the parties who signed the written contract with said attorneys authorized the employment of Gottschall & Turner upon the same terms and conditions as Judge Fisher and Lowry & King save only as to amount or rate of compensation.

It is conceded that the payments to said attorneys were a reasonable and proper compensation for their services. The executors insist, however, that these payments are not proper items of credit in said account because the contract does not provide for their payment by the executrix, and that it was beyond her power to bind the estate therefor.

The contract in writing is signed by said Irma C. Ricker personally and as executrix, and it is conceded that there is no provision therein that said compensation to said attorneys should be allowed and paid out of the estate. The executrix contends, however, that the parties entered into said contract with said attorneys with the distinct, collateral understanding and agreement, that if successful in said contest the amount they obligated themselves to pay said attorneys would be allowed and paid out of the estate.

The contract being in writing, the court is bound by its terms, and upon familiar principles can not, therefore, consider the uncontradicted parol evidence offered by the executrix in support of her claim aforesaid.

This evidence is also in direct conflict with the collateral written contract between the parties employing said counsel, in which it is agreed that if the will is sustained the amount so agreed

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to be paid said counsel is to be contributed and paid by them in fixed proportions as stipulated therein.

But if proper for the court to consider this evidence and if said counsel were employed by the executrix pursuant to such understanding, she did not bind the estate for their payment, for she may not do so by an executory contract and thus create a liability not founded upon a contract or obligation of the testator. If the services rendered under such employment were important and valuable and for the benefit of the estate, the law contemplates that she will pay the value thereof and be reimbursed by receiving credit for the amount thus paid in the settlement of her account. *Thomas v. Moore*, 52 O. S., 200, 204, 206.

Passing, then, the contract with said attorneys as creating no liability against the estate, the question is, what are the duties and privileges of the executor in case the validity of a will is contested, and under what circumstances may an executor be allowed credit in his account for the services of attorneys employed by him in the contest of a will?

Sections 12079, *et seq.*, of the General Code, provide for an action to contest a will, and contemplate a suit between those *claiming* under the will and those who consider themselves *injured* by it. Only a person interested in a will may contest it, and all devisees, legatees and heirs of the testator and other interested persons, including the executor or administrator, must be made parties to the action. An issue must be made up "whether or not the writing produced is the last will or codicil of the testate," which shall be tried by a jury.

The contest, therefore, is a statutory proceeding in which the contestant or plaintiff denies, and the defendants affirm, the validity of the will. The parties control the proceedings and the estate is not affected by the result. As said by Macfarlane, J., in *In re Estate of Soulard*, 141 Mo., 642, speaking at page 670:

"The technical contest in such statutory proceeding is over the validity of the will, but the ultimate object, the real object, is to determine the rights of the parties to the property. The estate is neither increased nor diminished by the result, and

the executor is only interested in seeing that the formal proof of the due execution of the will is made."

Under ordinary circumstances, those claiming under the will are the proper parties to defend it when assailed, and the executor is not called upon to do so, and as a general proposition he has no right to espouse the cause of the parties to either side, and engage in the contest and charge the estate with the expense thereof. *Alexander's Estate*, 211 Penn., 125.

Therefore, it is held in *Andrews v. Andrews*, 7 O. S., 143:

"An executor is not bound to assume the burden of the defense of a contest of the will by the *heirs-at-law*, but may properly throw the same upon the legatees or devisees."

And, further, that:

"The executor is not entitled, when the will is adjudged invalid, to charge the estate, in his settlement account, with the expense of maintaining such defense."

But, as said by Brinkerhoff, J., speaking for the court in that case at page 151:

"Should he do so, and do it successfully, it seems he would, in *that* case, be entitled to charge his proper expenses against the trust estate; and this for the reason that his expenditure inures to the benefit of the *cestui que trust*."

This case was followed and approved by the Supreme Court in the unreported case of *In re Estate of Daniel Laws, Dec'd*, 17 Bull., 80; 18 Bull., 198 (10th O. Dec., 39).

The facts in these cases are significant and deserve special attention. In both cases the action was brought by the heirs-at-law of the testator whom he had practically disinherited, and the contest therefore was between the heirs-at-law and the devisees and legatees named in the will. If the will was sustained the heirs would get nothing. If set aside, the devisees and legatees would get nothing. The heirs were all therefore interested and would be benefited in a successful contest of the will, and the

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beneficiaries under the will were all equally interested and would be benefited if the contest failed, and this interest caused all the heirs to array themselves as contestants and all the beneficiaries to band themselves together in the defense of the will. In both cases, the executor assumed the burden of the defense of the will. In the first case the will was set aside; in the latter the will was sustained, and therefore the successful defense of the executor in the latter case inured to the benefit of all the beneficiaries under the will, and if they permitted the executor to make the defense for them, the property devised to them should bear his expense in so doing.

Two facts stand out prominently upon the record in these cases and apparently control the question: (1) the contest was between the heirs as a class and the beneficiaries under the will as a class, arrayed as opposing forces with no middle ground between them; and (2) the beneficiaries made no defense but permitted the executor to make it for them.

But if an executor does assume the burden of a will contest and is successful, it does not follow that he is entitled to credit in his account in all cases for his expenses incurred in so doing. His right thereto depends upon the circumstances of each particular case. *Weir v. Weir*, 7 C.C.(N.S.), 289.

The circumstances or factor controlling his right thereto is his personal interest or lack thereof in the result of the contest. As said by Jelke, J., in *Weir v. Weir*, *supra*, speaking at page 290:

“Where done in a disinterested effort to maintain the will and preserve the trust therein created and to effectuate the intention of the testator as declared in what is found truly to be his last will and testament, a court of chancery may allow the executor credit in his account for his expenses incurred in defending such will.”

If he is a devisee under the will and his interest depends largely if not entirely upon its validity, the parties directly interested and not the estate should bear the expense of the litigation, for, as said by Macfarlane, J., in *In re Estate of Soulard*, 141 Mo., 642, speaking at page 670:

"Any other rule might operate ruinously to estates, and is contrary to the manifest policy of our law. If the expense of the contestants is to be paid out of the estate, they would have nothing to lose and everything to gain by the contest. There would be no limit to the expense the parties might incur short of the value of the estate itself. The entire estate could therefore be swallowed up in the litigation and the contestants, if successful, would reap a barren victory. A premium to contest the will would thus be given to parties who might be displeased with the disposition the testator had made of his property. But few unsatisfactory wills would escape a contest."

Looking then to the facts and circumstances of this particular case, the evidence discloses that the testator never married and died possessed of a large estate. In the second item of his will he devises to his grand-niece, Lois Curry, a minor, certain real estate and \$2,000 in money; in the third item thereof he devises to his grand-niece, Irma C. Ricker (nee Curry), certain real estate and appoints her executrix of his will and also trustee of the property devised to her sister in item two aforesaid; in the fifth item he gives to his sister, Mrs. Barr, \$10,000 in money; in item six he gives \$2,500 to his niece, Jean Curry Lindsey; in item seven he gives \$500 to his nephew, Henry Curry, and in item eight he gives to his grand-nephew and niece, Fern and Lowry Conley, jointly \$500.

These legacies do not dispose of his entire estate, and he died intestate as to a considerable residue which descends to his heirs-at-law. The specific legacies to Lois Curry and Irma C. Ricker are each of the approximate value of \$10,000.

The testator died leaving two brothers, John P. and Sylvester Curry; one sister, Mrs. Barr, and John V. and Elmer Curry, sons of a deceased brother. Irma and Lois Curry, the legatees named in items two and three, are children of said John V. Curry and grandchildren of said deceased brother. Jean Curry Lindsey, the \$2,500 legatee named in item six of said will, is a daughter of Sylvester Curry, a brother of the testator aforesaid. The \$500 legatees named in items seven and eight are children and grandchildren of John P. Curry, the brother of the testator aforesaid.

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Said John P. Curry, brother of the testator aforesaid, commenced an action to contest the will, and, having died, his brother, Sylvester Curry, renewed the same.

While Mrs. Barr survived the testator, she died before the commencement of said action of her brother, John P. Curry, to contest said will.

This action was tried three times before a jury and resulted in a final judgment sustaining the validity of said will.

Only the legatees, Irma C. Ricker and Lois Curry, and two of the sons of Mrs. Barr signed said contract of employment with said attorneys, the husbands of the two daughters of Mrs. Barr evidently representing them and by their authority signed the same for them. While Irma C. Ricker signed the contract as executrix, she bound herself personally only as heretofore shown. The attorneys represented those who employed them and their services were rendered evidently for the benefit of all their employers, and all were interested in having the will sustained.

Having employed counsel to defend said action to contest the will there was no occasion for the executrix to do so. Whether any of the other legatees should aid or assist or take any interest in the defense of said will was entirely personal to them and there is no evidence that they did so, or that they requested the executrix to make said defense.

The contest was not, therefore, between the heirs as a class and the beneficiaries under the will as a class, and the parties to said action were not thus interested and did not divide on those lines.

Said executrix being also a legatee had therefore a "divided duty" to perform, one of which she was not bound to assume, and self-interest would most likely prompt her to perform the other. She was, therefore, vitally interested in having the will sustained. Evidently the legacy to her and those to her sister, Lois Curry, and Mrs. Barr, invited the attack, and the rule is, that when her duty as an executrix is balanced against her private or individual interests the latter must yield, and all *doubts* and *uncertain* charges are to be resolved in favor of the estate,

for it would be inequitable for an executrix to defend her legacy and receive the same in its entirety with the expense of the defense charged to the heirs at law or residuary legatees under the will. *Weir v. Weir*, 7 C.C.(N.S.), 289, 291.

In view of the fact that she was a legatee and because thereof directly interested in sustaining the validity of said will, it is quite probable that her assumption of the defense of said will was not entirely a disinterested effort on her part as executrix to maintain the will regardless of any personal interest she may have had in the result of the contest. On the contrary, it is quite natural that in making said defense she was largely, if not entirely, controlled because of her personal interest in sustaining the will. If so, the case would fall within the general rule that an administrator or executor can not be allowed counsel fees incurred for services rendered in defense of his own personal interest, or where the litigation is in reality between beneficiaries, and not for the benefit or in the interest of the estate as a whole. *In re Whitlow's Estate*, 184 Mo. App., 229, 246, 247; 2d Woerner's American Law of Administration (2d Ed.), Section 516.

The further claim is made that these legacies are special and that said legatees are entitled to receive the same without deduction or diminution, and it was not the intention of the testator that they should stand any part of the expense of defending an unsuccessful attack upon the validity of the will, and that such expense should be justly borne by the residuary estate.

But as heretofore shown, it is a question between the legatees and the heirs-at-law, of whom only one of the latter attacked the will, and in which the estate can have no interest, and the case is not, therefore, unlike the case of *Weir v. Weir*, 7 C.C.(N.S.), 289, where the credit was disallowed because the attack on the will was chiefly due to the fact that a large special bequest was made to the executor, and although the attack was unsuccessful, it was held that the allowance was not permissible and the hardship cast upon the legatee requiring him to make the defense was "only one of the burdens incident to the acquisition and ownership of property," and, as said by Jelke, J., speaking at

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page 291 in that case, this objection would "lie just as well in the mouth of any successful defendant whose property rights had been assailed."

In the case of *In re Account of Ullman*, 12 C.C.(N.S.), 340, an executor successfully defended an action to set aside the will and was allowed a reasonable amount for counsel fees in that behalf, and the effect was to place the entire burden upon the residuary legatee. But it appears that the executor was practically a trustee and clothed with some extraordinary powers in addition to the ordinary duties of executor, and that such residuary legatee was the one most vitally interested in sustaining the will and made no defense and permitted the executor to assume the burden thereof and was quite willing to take the full benefits derived from such successful contest.

The claim is also made that the executrix was appointed because of the confidence reposed in her by the testator; that she represents the testator in carrying out his will; that it is her duty to carry his will into execution; that his wishes should be respected, and that so solicitous was the testator in that respect that he visits his wrath upon those of his kindred who would lay profane hands upon his will or question its validity, and it is urged, therefore, that the executrix had a right to devote his estate to the defense of his will and from the vandal hands of those who would destroy it.

The court was greatly impressed with this claim, and although it gave it much consideration it can not adopt the same. While the executor represents his testator not only in executing the will after its probate, he also represents him in having it probated. It is his duty, therefore, to have it probated, for this is necessary in order to make it effective. In so doing, he acts in the capacity of a representative of his testator, and is entitled to be reimbursed out of the estate for all expenses incurred in good faith in the discharge of this duty, whether the will be established or rejected. *In re Estate of Soulard*, 141 Mo., 668.

But the will having been admitted to probate, the effect of the commencement of an action to contest the will is, under Section 10633, G. C., to suspend, or at least greatly limit, the powers and

duties of the executor pending said litigation, and, as said by Macfarlane, J., in the case of *In re Estate Soulard*, 141 Mo., 671:

"The trusteeship of the executor is *suspended* during the litigation, and he has no power over the estate and no duty to perform in respect of it other than what he derived from his mere nomination by the testator."

And therefore, as said by him at page 672:

"While it would have been the duty of the executor to propound the will for probate, and in statutory contests to make formal proof of its due execution and attestation, if no one else undertook that duty, yet the expense of trying the matters contested should be borne by the parties interested in the result."

True, it is said by Brinkerhoff, J., in *Andreus v. Andrews*, 7 O. S., 143, speaking at page 151, that an executor is a trustee and having accepted a trust is bound to defend the trust estate; but he adds that with the exception of an *obiter dictum* referred to in the same opinion:

"We find no authority to sustain the position that a party acting as trustee is bound to defend the relation of trustee whenever the *rightful existence* of that relation is assailed or called in question."

The defense of a trust estate, therefore, presupposes its *rightful* creation and authority to exist. The defense of the validity of its creation is another matter and quite apart from the control and management of the trust estate.

The executrix, therefore, being a legatee and interested personally in sustaining the will, having joined with the other legatees likewise interested in sustaining the will in the employment of counsel to defend the same, there was no occasion for her, as such executrix, to do so, and it follows that said amounts so paid to said attorneys are not proper items of credit in her account and should be disallowed, and the exceptions thereto are sustained.

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Mallon v. Price.

LIABILITY OF PARENT FOR ASSAULT BY MINOR SON.

Superior Court of Cincinnati.

NELLIE MALLON V. VICTOR T. PRICE ET AL.

Decided, May, 1917.

Parent and Child—Pleading—Father Charged With Negligence—In Permitting Minor Son to Assault Plaintiff.

Where a petition charges liability against parent and minor child, for the tort of the child, and the only averment against the parent is his negligence in failing to protect the complainant, the parent having notice of the child's previous feckless and bad character, but no averment charging both as joint tort feasons, a demurrer on the ground of misjoinder of parties defendant will be sustained.

Bolsinger, Kuhn & Bolsinger, for plaintiff.*Thos. B. Paxton, Jr.*, contra.

GUSWEILER, J.

This cause is before the court on a demurrer to the plaintiff's petition on the ground of misjoinder of parties defendant. The petition alleges, among other things, an assault and battery against plaintiff by the minor son of Victor T. Price, joining therewith an allegation of negligence of the father in that he failed to protect plaintiff from said assault, having previous knowledge of the reckless and bad character of his son.

There is no averment that the son's tort was committed in the father's presence nor by his expressed direction. We are of the opinion that unless the petition contains some averment indicating a direct, overt tort on the part of the father joining with the son, or under the father's expressed direction promoting or encouraging the son's tort, the action is not joinable. If the charge against the father indicates *respondeat superior* or agency liability, chargeable against the father for the son's tort in any form, the actions must proceed by separate petitions. If the father by a preconcerted arrangement with the son had the

son to commit the tort, they would both be liable and could be charged in the same petition as joint tortfeasors, whether the relation was that of father and son or that of strangers. *French v. Construction Co.*, 76 Ohio St., 509, citing: *Clark v. Fry*, 8 Ohio St., 358; *Parsons v. Winchell*, 59 Mass. (5 Cush.), 592; *Seelen v. Ryan & Co.*, 2 C. S. C., 158; *Warax v. Railway*, 72 Fed., 637; *Mulchey v. Methodist Rel. Soc.*, 125 Mass., 487; *Campbell v. Sugar Co.*, 62 Me., 552; *Page v. Parker*, 40 N. H., 47; *Bailey v. Bussing*, 37 Conn., 349.

On the averments contained in the petition in the instant case, we are of the opinion that the demurrer is well taken. The plaintiff will be given leave to elect as to which of the two defendants plaintiff desires to proceed against, said election to be made within fifteen days, otherwise the petition will be dismissed without prejudice.

RIGHTS OF A WIDOW GIVEN A LIFE INTEREST IN A RESIDUARY FUND.

Common Pleas Court of Hamilton County.

IN RE ESTATE OF FRANK MESSANG, DECEASED.*

Decided, June, 1916.

General Bequest of Income—Begins to Run at Death of Testator, When—First Year's Allowance—Compensation to Executrix Who is Also Life Tenant.

1. A bequest by a testator to his wife of all the income from his estate, real and personal, during her natural life, is a general bequest of the income from the residuary fund of his estate and begins to run from the moment of his death.
2. Where the will does not expressly direct that the bequest of the entire income from the estate shall be in lieu of the first year's allowance, the widow upon electing to take under the will is entitled to her first year's allowance.

*Affirmed by the Court of Appeals.

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3. A life tenant who is also the executrix of the estate is entitled to compensation on the entire amount of the estate coming into her hands, and should not be limited to the amount collected and disbursed, where the estate is in the form of securities which are to be held by her for the purpose of paying the income therefrom to herself.

Herman P. Goebel, for exceptors.

Bettinger, Schmitt & Kreis, contra.

GEOGHEGAN, J.

Appeal from the probate court upon exceptions to the account of the executrix herein.

This appeal presents four questions for consideration and they will be taken up in the order that they were presented by counsel upon the hearing of this appeal.

1. The contention is made that the executrix, who is the legatee of the income from the residuary estate for and during the term of her natural life, did not charge herself with the income received from the property during the eighteen months next succeeding the admission to probate of the will of the decedent. This exception should not be sustained. In the case of a bequest of life estate in a residuary fund, if no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the clear residue, as afterward ascertained to be computed from the time of the death of the testator. This is the rule that is supported by the great weight of authority. 40 Cyc., 1882; *Schouler on Wills*, Section 1479; *Lawrence v. Security Co.*, 56 Conn., 423; *Dawson v. Rake*, 44 N. J. Eq., 506; *Corle v. Monkhouse*, 47 N. J. Eq., 73; *Matter of Benson*, 96 N. Y., 499; *Bancroft v. Security Co.*, 74 Conn., 218; *Weld v. Putnam*, 70 Me., 209; *Brown Estate*, 190 Pa. St., 464.

In this case the testator, after the payment of his debts, gave and bequeathed to the executrix herein, his wife, the income of all his estate, real and personal, during her natural life. This was a general bequest of an income from the residuary fund of his estate, and under the authorities hereinbefore cited, this

bequest commenced to run from the moment of the death of the testator.

2. An exception is taken to the account of the executrix in that it charges the estate with a disbursement of \$2,000 to said executrix, as and for her first year's allowance. The assertion is made that inasmuch as there was a bequest of the total income to the widow, her statutory first year's allowance can not be had when she elects to take under the will which gives her the entire income. This matter was effectually disposed of by Judge Ranney in *Collier v. Collier*, 3 O. S., 369, and an examination of the statutes does not show that the Legislature has ever evinced an intent to destroy the holding of the Supreme Court in that case, but rather to support it, with the exception, however, that the statute now provides that an election to take under the will does not bar the widow of her year's allowance, "unless the will expressly otherwise directs." General Code, Section 10572; *Estate of Rierdon*, 5 N. P., 516. Therefore, as the will does not expressly direct that the bequest of the income is in lieu of the first year's allowance, the exception to this charge should be overruled.

3. The third exception is directed to the amount of statutory compensation charged. The executrix charged a statutory compensation upon the whole estate amounting to \$65,324.16. Counsel for the exceptors claim that the compensation should be only upon the actual amount of cash received and disbursements made, amounting to \$5,901.67. The account shows a separation of the securities from the cash collected, and further shows that the securities were to be held by the executrix for the purpose of paying the income therefrom to herself individually during her life, as provided for in Item II of the will. I know of no reason why she should not be allowed compensation upon the total amount of personal property handled and held by her. One of the important functions of her office as executrix was to preserve intact, in so far as possible, the securities which formed the corpus of the estate; to sell such of them as might be necessary to pay the debts of the estate, and upon the filing of her account, to turn same over to the proper person, which was in

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this instance herself, to carry out the provisions of the trust. She did this, and there does not seem to be any reason why she should not be allowed the statutory compensation upon the whole amount. The court below seemed to take the view that, inasmuch as an administrator *de bonis non* would have to be appointed to make a final distribution to the remainderman, the compensation ought to be apportioned, so he allowed the executrix \$1,000, reserving the balance of \$426.45 to her successor.

While it is true that the general rule of law is that where the residue of the estate is bequeathed to the executors as trustees for certain purposes, and the duties of the executors as such are distinct from those as trustees, they are entitled to commissions in both capacities, still I think that in view of the peculiar provisions of this will, which does not in terms provide that Louise Messang shall be trustee, but always refers to her as executrix, even in the item which gives her a power of sale, and a duty to invest or reinvest the proceeds thereof, that the general rule laid down in *Johnson v. Lawrence*, 95 N. Y., 154, should be applied here. In that case, Finch, J., stated the reasons of the application of the rule to be as follows:

“It is apparent that from the very beginning the duties of the executors were blended inseparably with the trust duties, and were so intended to remain. * * * There was no point of time, * * * at which it could be said that one function ended and the other began. As a trust duty it sprang into life at the same instant with the executorship, and inextricably blended with it.”

It may be true that in this case the blending of the two functions is not as complete and as inseparable as in the case just cited; nevertheless, there is sufficient blending to the duties to justify the application of the rule just referred to.

4. An exception is also made to the allowance of \$1,200 as attorney's fees in this matter. Counsel for the executrix, when the exceptions were heard below, was subjected to a very long examination, and upon the conclusion thereof, the allowance of \$1,200 to him as fees was sustained. I have examined very carefully the transcript of the testimony, which was filed here-

with, and am convinced that his services were of such character as would not warrant a disturbance of this allowance at this late date. The probate judge who heard this cause has had a long experience in matters of this kind, especially in fixing fees and allowances to counsel, and I would be inclined in most cases to follow his view in the matter, unless it would seem to be so clearly unwarranted by the facts as to occasion a belief that it was done hastily and without due regard to the evidence presented and the surrounding circumstances. However, in this case, the hearing seems to have been full and complete, and my own view of the matter is that the allowance is not exorbitant.

A decree may be prepared in accordance with these findings.

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**ELEMENTS CONSTITUTING THE DIFFERENT DEGREES
OF MURDER.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. BLAINE SNOUFFER.

Decided, June 22, 1917.

Criminal Law—Various Degrees of Homicide Defined—Duty of the Court in Instructing a Jury—Ought Not to be Permitted Unguided Discretion in Determining the Degree of the Crime—Jury May Convict of a Lesser Degree Only When the Law and Evidence so Warrants—In the Absence of Evidence Showing a Lesser Degree No Instruction Should be Given Touching Such Degree.

1. Where a mortal wound is purposely inflicted by the use of a deadly weapon in such manner as is calculated to produce death, and death follows in a few moments, the crime is murder, the degree thereof depending upon the state of mind of the slayer. If a deliberate and premeditated purpose to kill be manifest by antecedent menaces or threats, former ill-will, secret enmity or sullen malevolence toward the deceased, or by other acts or circumstances calculated to disclose an inward fatal purpose or intention of the accused towards his victim, the homicide is murder in the first degree. If these elements are lacking and there is evidence of the use of a deadly weapon in such manner as appears to have been purposely calculated to produce death, the killing is second degree murder.
2. Where the evidence adduced discloses antecedent menaces, threats, former ill-will, sullen malevolence towards the deceased, as well as the use of a deadly weapon in a manner purposely calculated to produce death, and death immediately follows; and if there is no evidence of a sudden quarrel, or heat of passion provoked by adequate provocation, the homicide does not constitute manslaughter.
3. It is the function and duty of the court to properly instruct the jury concerning the essential characteristics of adequate provocation and not leave its determination to the unguided discretion of the jury. The court should define the adequacy of the cause in restricted form, and not leave it to the uncontrolled judgment of the jury.
4. Section 13692, General Code, authorizing the jury to find one accused of crime not guilty of the degree charged, but guilty of an inferior degree thereof, when the indictment charges an offense including different degrees, is not designed to confer unlimited power and discretion upon the jury regardless of law and evidence. It

- merely contemplates that the jury may convict of the lesser degree when the law and evidence warrants.
5. In a prosecution of a crime under an indictment including different degrees, the proper rule of law and procedure is that where there is no evidence tending to prove a lesser degree, no instruction concerning such degree should be given or form of verdict be submitted.
 6. In a prosecution for first degree murder where death immediately follows infliction of a mortal blow by the use of a deadly weapon, and there is no evidence to sustain assault, assault and battery, no instruction should be given, and no forms of verdict be submitted.
 7. Because a jury may disregard the law and evidence, must the court submit all degrees of homicide regardless of the state of evidence giving it right to pass upon the degrees—*quaere*.

(Syllabus by the Court.)

Robert P. Duncan, Prosecuting Attorney; *Hugo Schlessinger*, Assistant Prosecuting Attorney, for plaintiff.

Franklin Rubrecht and *Frank M. Raymond*, contra.

KINKEAD, J.

The indictment charged defendant with first degree murder by cutting the throat of the deceased with a razor. All the large vessels of the neck were severed; the wind pipe was cut; the carotid arteries were cut. The cut was a very deep one, extending clear back to the spinal column. The wound was necessarily fatal, and death resulted in a few moments.

All of the organs of the body were normal. The cause of death was a cut throat; secondary cause, hemorrhage.

The evidence clearly disclosed previous ill-will, malevolence, threats, and admissions that he had previously formed the design to take the life. It is not necessary to set them forth in detail: they are to be found in the record. Acts of preparation and determination to kill are clear and distinct. The girl had refused his attentions and defendant had become enraged. On the occasion of the fatal visit to the house where deceased was employed, being unable to gain admission at the kitchen door, defendant went to another part of the house which was occupied by another family. When the door was opened by a lady he insultingly and rudely inserted his foot in the door way and prevented its being closed. He forced himself into

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the house, and failing to find his victim downstairs he forced his way upstairs by forcibly breaking open the door leading from the dining room and ran upstairs. The door of the bed room where deceased had endeavored to secrete and protect herself was locked, but defendant forcibly broke it down. Deceased endeavored to run out and past defendant, but he caught her, and deliberately cut her throat in the presence of one of the ladies of the house, after having deliberately, quietly and politely asking her to step away.

The evidence clearly established antecedent threats, menaces, sullen malevolent spite and conduct, and admissions thereof by defendant.

It was a clear, typical case of first degree homicide.

On motion for new trial the contention is advanced that the court might have unwittingly produced some sort of influence on the jury by the charge given on the question of manslaughter and assault and battery, and the decision of the court not to send to the jury forms of verdict for assault and battery.

Counsel for the defense contend that it has been the practice for many years to charge the jury upon all the elements of homicide including assault, assault and battery, and to send to the jury forms of verdict covering these lesser degrees of crime, in order that it might have an "untrammelled opinion as to their verdict without any suggestion from the court." Counsel question whether the jury "were given absolute freedom by the court."

As stated orally by the court the jury was not given untrammelled opinion as to their verdict and designedly not; under the charge the jury could only lawfully render a verdict for murder in the first or second degree, although it might have rendered a verdict for manslaughter. But counsel suggest: Suppose the jury had rendered a verdict for a lesser degree of crime, could the court have set it aside? The judge must instruct the law applicable to the evidence. The answer is that the court is powerless to prevent such a miscarriage of justice.

A charge in criminal as well as in civil cases must accurately present to the jury the *questions presented* by the indictment and the *evidence*. Failure to correctly do this constitutes reversible error.

But it is no legal sin to err against the state, and prosecutors seldom feel justified in prosecuting exceptions for the correction of an evil practice. Therefore, as long as trial courts travel along the path of least resistance, we are likely to move along in the old ruts of formalism.

The mind of the jury should be so quickened by the charge of the court that it may understand the law, and properly apply it to the ultimate facts deduced from the evidence. It should be made to understand that the law of the instruction or rule of law stated therein has no relation to matter foreign to the evidence.

The charge or forms of verdict submitted should not make it possible for the jury to render a verdict which is not supported by any evidence, and thus contribute to a miscarriage of justice.

It has long been an unjustifiable practice in this state to instruct the jury as to the degrees of the homicide, including assault and battery, regardless of the fact whether the evidence sustains or warrants it.

The jury is thus given to understand that it is permitted to return any one of the forms of verdict from first degree homicide to simple assault, regardless of the evidence, when there is no evidence tending to sustain any of the lesser offenses.

We have thus been slaves to custom and senseless formalism long enough. Trial courts have pursued this course rather by way of precaution, and without regard to law.

It is fundamental that an instruction to the jury must be founded on the claims of the parties made by the evidence. But no instruction should be given upon any phase of criminality embraced therein if there is *no* evidence tending to sustain it.

In this case there was no sudden quarrel, no heat of blood as in pure type of manslaughter; there was no provocation—no adequate provocation. The deceased on learning that defendant was at the house to see her ran away from him, locked herself in a bed room. There is no evidence of words or quarrel—nothing but cool deliberate determination to *kill*—carefully planned and executed.

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In order to precisely show how the questions were submitted to the jury, the material parts of the charge are here set forth:

“MURDER IN FIRST DEGREE.

“Murder in the first degree consists in taking the life of another purposely and with deliberate and premeditated malice.

“Specific intent to kill with deliberate and premeditated malice are the essential elements of this degree of homicide.

“Intent, purpose to kill, deliberate and premeditated malice are manifestations of the mind.

“While intent and malice are both descriptive of the mind, malice denotes a wicked purpose which characterizes the perpetration of a criminal act, and qualifies the intent and mind of the slayer.

“In first degree murder it is essential that the accused shall have formed the intent and purpose to kill, that he must have thought it over and deliberated upon it for some period of time and then to have carried it into execution.

“If the purpose to kill be the conception of but a moment, if it be thought over and considered by the accused for a short or long period of time, and is then carried out by the act of killing, it is done with deliberate and premeditated malice.

“MALICE IN FIRST DEGREE.

“Malice in first degree murder must be express or actual as distinguished from implied malice, the characteristic of the second degree.

“Malice denotes the condition of mind of one who commits crime; it is not restricted to mere spite or malevolence toward the person killed; it is descriptive of the state of mind of one accused of murder; it is indicative of general malignity of mind, of reckless disregard of human life which proceeds from a mind devoid of just sense of appreciation of social duty and moral and legal obligation to mankind and womankind. It denotes wicked intention, depraved nature and inclination to mischief or injury, intention to injure without just cause or excuse; a wanton disregard of the right, safety or life of others.

“INTENT AND MALICE, HOW PROVED IN FIRST DEGREE MURDER.

“Intent to kill, express or premeditated malice being essential manifestations of the mind to be proved in first degree murder, may be revealed or shown by acts, conduct, ill-will or one accused of this crime, as well as by threats made.

“To show deliberate and premeditated malice, or that an accused killed another with a sedate, deliberate mind and prior

formed design, there must be something more than the use of a deadly weapon in a manner purposely calculated to produce death. Deliberate and premeditated malicious purpose to kill may be manifested in different ways, as by antecedent menaces or threats, former ill-will, secret enmity or sullen malevolence towards the deceased, or by any other acts or circumstances calculated to disclose an inward fatal purpose or intention of the accused towards his victim.

“Intention to kill may be presumed or inferred under certain conditions and circumstances; and it may also be specifically shown by acts, threats or conduct.

“Whatever a man intentionally and willfully does, he is presumed to have intended to do; he is presumed to intend the natural and probable consequence of his voluntary and deliberate act, unless the facts and circumstances indicate otherwise.

“In this state there is no presumption of law of an intent to kill from the use of a deadly weapon. The effect or responsibility for the use of a deadly weapon by one accused of murder is within the sole province of the jury to determine from the character of the weapon and the manner of its use.

“If one accused of murder is shown to have intentionally used a deadly weapon, in such manner as satisfies the mind of the jury that it was purposely calculated to cause death, and death follows the infliction of a mortal wound, in such case the jury may infer that the slayer intended to maliciously kill his victim.

“Such deduction by the jury is characterized as implied intent to kill, and implied malice, which is sufficient to convict an accused of murder in the second degree. But as already stated it is insufficient to convict of first degree murder, further evidence of deliberate and premeditated malice, or of prior premeditated design being essential to sustain a verdict of murder in the first degree, such as prior menaces or threats, former ill-will, secret enmity, sullen malevolence towards the deceased as before stated.

“The evidence must show that the accused formed a purpose to kill, that he deliberated upon it for some period of time before the act of killing—the length of time not being material. It must appear that defendant formed the purpose to kill, that he thought it over, deliberated upon it, then committed the act of killing.

“If the jury finds that defendant purposely killed the deceased with deliberate and premeditated malice, your verdict should be one of guilty of murder in the first degree. If this should be your verdict the defendant shall be punished by death unless the jury recommends mercy, in which case the punishment shall be imprisonment in the penitentiary for life. If the

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jury considers it proper and just under the circumstances to recommend mercy, it may do so. If it considers that the facts and circumstances do not warrant such recommendation, it may not make it.

"The matter of making such recommendation, or not making it, is within the exclusive discretion and judgment of the jury.

"If the jury should entertain a reasonable doubt of the guilt of defendant of murder in the first degree; that is if you should have a reasonable doubt as to whether the defendant took the life of the deceased purposely and with deliberate and premeditated malice, then you should resolve that doubt in his favor and acquit him of murder in the first degree.

"If this should be your finding, then you will consider his guilt or innocence of the crime of murder in the second degree.

"MURDER IN THE SECOND DEGREE.

"Murder in the second degree is the act of purposely and maliciously killing another.

"It consists of an intentional malicious killing, but without deliberate and premeditated malice.

"The essentials of this degree are intent to kill and killing with malice.

"Intent to kill may be shown in the same way as in murder in the first degree; that is, by the use of a deadly weapon in such manner as is purposely calculated to take life. The jury may infer the intent to kill from the manner of using the deadly weapon, if it is satisfied that it was purposely calculated to produce death. The rule has already been sufficiently explained.

"Malice in second degree is implied and not actual or express as in the first degree. It has the same general meaning in both degrees as already explained, except that in this degree of homicide it is not accompanied by deliberation and premeditation.

"There is no deliberate mind or formed design to take life in second degree, the act of homicide being committed without justification or excuse, and without provocation to reduce the offense to manslaughter.

"Where the killing is committed without previous formed design and premeditation, but under the influence of a wicked and depraved mind, or with a cruel and wicked indifference to human life, the law implies malice and makes the offense murder in the second degree.

"If the jury has a reasonable doubt whether defendant took the life of the deceased purposely and with deliberate and premeditated malice:

“And if from the manner in which defendant used the razor, the jury infers an intention to kill, and if you infer that he maliciously killed the deceased, but without deliberate and premeditated malice, your verdict should be one of guilty of murder in the second degree.

“If you should find, however, that defendant did not intentionally and maliciously kill the deceased, but that the act was committed in the heat of passion, you will then consider the law relative to the crime of manslaughter.

“MANSLAUGHTER.

“Manslaughter is the unlawful killing of another either upon a sudden quarrel, while in the heat of passion, or while in the commission of an unlawful act.

“Malice is not an essential of manslaughter. That is malice as it is presented in first and second degree murder, is not a necessary element of manslaughter, although implied malice may sometimes be present in this degree of homicide.

“The express intent to kill, and express or implied malice accompanying the same, is the distinguishing characteristic between the two higher degrees of homicide and manslaughter.

“When a person kills in a sudden quarrel, the grade or degree of the crime may be reduced to manslaughter only when there has been some adequate provocation which produces passion, heat of blood, temporary excitement disturbing the control of reason, in which state of mind the accused kills another while under the influence thereof, and before the lapse of reasonable time for the blood to cool and reason to resume control of the mind of the slayer.

“If a person kills another under such circumstances, the law imputes it to the infirmity of human nature, and not to the malignity and depravity of the mind. Taking life upon adequate provocation is killing another in the sudden heat of passion when reason is dethroned by acts of the person killed which tend to inflame the passion and produce heat of blood.

“Provocation merely reduces the grade of crime, but does not altogether excuse it.

“Mere passion suddenly aroused without reasonable, legal cause, can not reduce a homicide to manslaughter. It must be aroused upon adequate cause, and the slayer must be a reasonable person under the circumstances.

“What constitutes adequate and sufficient provocation to reduce the grade of crime is not to be left to the uncontrolled power of the jury. It is the province and duty of the court to instruct the jury as to the rule of law concerning the adequacy of the provocation appropriate to the evidence adduced.

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“Mere refusal of a woman to receive the attention of a man, and anger, passion or heat of blood excited thereby, without other adequate cause, does not constitute adequate cause to reduce a killing under such circumstances to manslaughter.

“The jury will apply the rules of law to the evidence in this case and determine the ultimate fact whether the killing was done with or without provocation and render your verdict according to the law given you by the court and evidence.

“The jury may only render a verdict of manslaughter when the evidence shows adequate provocation. If the evidence fails to show adequate provocation for the killing, a verdict for manslaughter may not be returned.

“While the indictment embraces a charge of assault and assault and battery, a verdict for such offenses may be rendered only when the evidence fails to show that death does not result from such assault or assault and battery.

“The act of using a razor which produced death of the deceased not being disputed, or controverted by evidence, no forms of verdict for assault or assault and battery are submitted to the jury.”

MANSLAUGHTER AND ADEQUATE PROVOCATION.

It is to be remembered that the legal conception of manslaughter is the same under the present statute (G. C., Section 12404) as prior to the codification of the criminal statutes; and that it is incumbent on the state to prove that the killing was done “either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act.” *Johnson v. State*, 66 O. S., 59.

The instruction or statement of the rule in the charge given, was, that when a person kills in a sudden quarrel the grade of crime may be reduced to manslaughter only when there has been some adequate provocation which produces passion, heat of blood, etc.; that mere passion suddenly aroused without reasonable, legal cause can not reduce the crime.

Being of the opinion that the evidence failed to disclose adequate legal provocation the court expressed the view that the determination of what constitutes adequate and sufficient provocation is not to be left to the unguided determination of the jury, it being the duty of the court to give some instruction concerning the same. The jury should not be left to decide that mere heat of blood constituted adequate provocation.

The sole cause of passion aroused in the mind of the defendant was the refusal of the deceased to receive his attentions. This is strikingly made to appear from her last declaration, viz: "Oh! don't do anything. I'll talk to you!" In the charge the court properly eliminated this as not constituting provocation. Mere passion was also eliminated. It was stated that the passion must be aroused upon adequate cause, and that the slayer must be a reasonable person under the circumstances. The jury was then directed to apply the rules of law and determine whether the killing was done with or without provocation, and an appropriate verdict was submitted.

This was more than defendant was entitled to; there was no quarrel; the deceased had said nothing or had not done anything that furnished reasonable or adequate provocation for the act of killing. The evidence showed on the contrary that defendant came to the house with a preconceived determination to take the life of the deceased.

The rule as stated in the instruction is thus stated in *Williams v. State*, 161 Ala., 52 (1909):

"It is not within the uncontrolled power of the jury to say what should be taken as sufficient provocation. What would be sufficient provocation of such passion as would reduce the grade of the homicide is a question of technical, legal learning, which should be defined by the court and not left to the jury." See *Michie Law Homicide*, Section 271; 81 Am. Dec., 781; 161 Ala., 52; 71 Am. St., 553; 8 Am. St., 477.

It is held that provocation by words only can not reduce the killing to manslaughter. *State v. Davis*, 50 S. C., 405; 62 Am. St., 837.

As a general rule no provocation of words will reduce the crime to manslaughter. 71 Am. St., 567. If the provocation be not of the character which, in the mind of a just and reasonable man, would stir resentment to violence endangering life, the killing would be murder. 16 Am. St., 1, 19. See generally *Michie on Homicide*, 215; 95 Ala., 22; 27 Tex., 758; 55 Am. Rep., 756; 37 Am. St., 836; 8 Am. St., 477.

There is conflict of opinion among the decisions concerning the subject of provocation.

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In some decisions the view is taken that adequate provocation for such a state of mind as will reduce homicide committed under its influence to manslaughter, must be anything the natural tendency of which would produce such a state of mind in ordinary men, as will cause passion and dethrone reason, and which the jury are satisfied did produce it in the case before them. *State v. Grugin*, 147 Mo., 39; 71 Am. St., 553.

There is a tendency among some authorities to leave it to the jury to decide what is a reasonable or adequate provocation for such a state of mind as should give to a homicide committed under its influence the character of manslaughter as a question of fact for the jury to decide according to the facts and circumstances regardless of the law as laid down by the court. *Maher v. People*, 10 Mich., 212; 81 Am. Dec., 781; *Biggs v. State*, 29 Ga., 723; 76 Am. Dec., 630.

Many decisions are found in the books where mere words are regarded as insufficient. *State v. Dans*, 50 S. C., 405; 62 Am. St., 837.

The rule in Ohio seems to have been more restricted as favoring the idea that it is the function of the court to define the adequacy of the cause in restricted form, and not to leave it to the uncontrolled judgment and discretion of the jury. See also *Michie Hom.*, p. 202; 74 Ga., 825.

In *State v. Elliott* (Pugh, J.), it was held that:

"A legal provocation in manslaughter law means personal violence or personal violence accompanied by words.

"The object of the rule of provocation is to guard human life from brutal rage, and at the same time palliate human frailty. Nothing would be gained by substituting for this rule the fluctuating rule, which is often contended for in desperate criminal cases, by which each man shall be judged according to the excitement natural to his peculiar temperament when aroused by real or fancied insult given by words alone." *State v. Elliott*, 11 Ohio Dec. (Reprint), 116; 26 W. L. B., 116; affirmed by Sup. Ct. without report cases cited 6 Blackf., 299; 8 Ire., 344; 96 N. C., 20; 8 Cal., 435; 38 Mo., 270.

The doctrines of legal provocation have been stated to demonstrate that no mistake was made against the defendant in this case. He was given a chance for a verdict in manslaughter,

by the instruction given and by submission of a form of verdict, when as matter of fact and law, he was not entitled to such verdict under the law and the evidence.

State v. Elliott, supra, was affirmed without report by the Supreme Court, thus giving trial courts some warrant for eliminating certain acts clearly insufficient to constitute adequate provocation from consideration by the jury.

The difficulty encountered by trial courts in giving instructions to the jury in first degree homicide may thus be stated:

When the case presented clearly tends to show either second or first degree murder, it is difficult to frame an instruction concerning manslaughter that adequately applies to the evidence. A general definition of manslaughter including the essential elements of provocation may tend to confuse rather than to assist the jury. When there is no evidence of provocation we ought to have the liberty of being clear and specific about it.

It is difficult to give a concrete instruction as to provocation and adequate cause so as to aid the jury. If the doctrine of *State v. Elliott, supra*, that personal violence accompanied by words is to be regarded as the standard then we may have few first degree cases in which an instruction in manslaughter may be given.

Where there is personal violence, or apparent purpose or threat to do violence, we encounter difficulty in differentiating between self-defense and provocation. This is shown by the writer in *State v. Wells*, in a charge given to the jury:

“What constitutes adequate and sufficient provocation to reduce the grade of crime is not to be left to the uncontrolled power of the jury to say—as being mere mental excitement, heat of blood and dethroned reason without regard to cause. * * * Mere words or threats to injure another, by a woman to a man, without some act or action, unaccompanied by some demonstration from which the slayer may have reasonably inferred an intention on the part of the deceased to execute the same, with apparent ability to do so, will not constitute adequate provocation. If there is no apparent or imminent danger of threats being executed, there can be no justification for heat of blood or passion in the mind of a reasonable person.

“If there be no acts evincing an intention to resort to the immediate use of force, and no apparent ability to execute

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them, there can be no justification or excuse in law or fact for taking life while in a sudden heat of passion under such circumstances.

"In case of threats made by a woman on sudden quarrel between a woman and man, the jury may take into account, the disparity of strength and ability to execute the threat on the one hand and to resist it on the other hand.

"If an accused permits his passions to be inflamed by something not constituting legal provocation, the killing can not then be manslaughter, but must be murder.

"If the jury should conclude that the deceased informed defendant that she had the disease of syphilis and that this gave rise to a sudden quarrel and heat of passion, such fact alone, without other overt acts and threats indicating apparent intent to execute the same, would not constitute adequate cause to reduce the killing to manslaughter," etc.

The foregoing is an illustration of what is believed to be the appropriate function of the court in the matter of instruction concerning the adequacy of provocation.

Unless it be conceded that a trial court has some such function or duty to perform, the result will often be that instructions on the subject of manslaughter will be wholly inapplicable to the case, and afford license to the jury to disregard law and evidence.

Indeed it is to be hoped that some trial judge will some day be sufficiently courageous to decline to give instructions concerning manslaughter when the evidence clearly does not warrant it.

In Colorado it is said:

"It is well settled that in a prosecution for murder where there is no evidence from which a jury would be justified in finding the defendant guilty of manslaughter, a trial judge is not required to instruct upon that grade of homicide." *Demato v. People*, 49 Colo., 147; 111 Pac., 703; Ann. Cas. 1912 A, 783; *Mow v. People*, 31 Colo., 351; *Crawford v. People*, 12 Colo., 290; *Carpenter v. People*, 31 Colo., 284.

Provocation sufficient to reduce to manslaughter must not only be reasonable but *co-existent with the absence of malice*. How then can there be justification for a charge of manslaughter in such a case as this where a deadly weapon was used so as to justify the conclusion that it was *purposely* and *maliciously* designed to cause death, malice being presumed.

The provocation must be such as to eliminate malice implied or actual. In this case the proof disclosed both.

Passion alone is not provocation. It must be passion justly excited by legal provocation. There must be a concurrence of passion, anger, sudden resentment or terror, and adequate cause to produce such passion. *Hatchell v. State*, 47 Tex. Cr., 380; 84 S. W., 234 (an instructive case).

In *State v. Mewhinney*, 43 Utah, 135; 134 Pac., 632; Ann. Cas. 1916 C., 537, the court observed:

"Where there was some evidence * * * from which the jury could have found a deliberate and premeditated murder, yet the jury would not have been justified in finding that the murder in question was not committed in an attempt to perpetrate a robbery, and upon the latter question there is not even room for doubt or conflict. Under our statute a murder so committed constitutes murder in the first degree and legally can constitute nothing else.

"True, a jury in any homicide case has the power to disregard the evidence and may find one who is clearly guilty of first degree murder guilty of manslaughter or acquit him.

"From this it is assumed that, because a jury may do this, therefore, a court must submit all the degrees of murder, and thus give the jury the right to pass upon the several degrees of murder. * * * While it is true that under our jurisprudence a jury has the power, with or without reason, either to reduce the degree of the crime, if it be divided into degrees, or to acquit the accused, it does not follow that a court is bound in effect to charge that they may disregard the law, the evidence, and their oath in arriving at a verdict."

Speaking of the failure to submit the second degree murder where the killing was perpetrated in an attempt to rob, the court stated:

"Neither is it correct to say that by not (doing so) * * * the court thereby in effect coerces the jury to find the accused guilty of murder in the higher degree. Whether such might be the effect under our statute depends upon the evidence. * * *

"It is the law that fixes the degree of the offense, and when the facts are not in dispute and clearly show that the murder in question was committed as aforesaid, the jury have neither the legal nor a moral right to refuse to follow the law and in refusing to do so in effect amend or repeal the statute.

"Of course, if the jury refuses to be bound by either law or fact, a court is powerless."

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On the question whether the trial court erred in refusing to charge with regard to murder in the second degree, under all the facts and circumstances the court stated:

"Upon this question we are of the opinion that there was absolutely no evidence either direct or inferential which would have justified a finding by the jury other than that the murder * * * was committed in an attempt to perpetrate a robbery. *If this be correct, why submit a question to the jury upon which an affirmative finding can in no event be justified? Is not the question of whether there is any evidence in support of any essential fact as much a question of law in a homicide case as any other?*

"Must the court in advance abdicate its prerogative to the jury simply because that jury has the power, and perhaps the inclination, to disregard both law and fact?"

McCarty, C. J., in a concurring opinion stated:

"True the jury have the power in this class of homicides to find the accused guilty of any of the lower degrees necessarily included in the charge * * * or to acquit him. They may even do this though it is conclusively shown by the evidence that he is guilty of murder in the first degree and there is no evidence tending to reduce the crime to a lower degree. *But it does not follow that because a jury have the power to ignore the evidence and in violation of their oaths to bring about a miscarriage of justice by refusing to do their duty, the court should in its instructions authorize and in a sense invite them to do so.*"

We come now to a consideration of the question of the propriety of charging the law pertaining to each degree of homicide, viz: murder in first and second degree, manslaughter, assault, assault and battery, which has been the customary practice for so long.

It has been thought to be essential to thus charge the jury because of the provisions of Section 13692, viz:

"When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree."

We must have a proper conception of the purpose and effect of this statute. It does not design to confer unlimited power and discretion on the jury regardless of law and evidence. It was

not the intent to deprive the court of its power to decide whether there is any evidence tending to support a charge. It contemplates that when the law as given by the court and the evidence warrants it, the jury may find the accused guilty of a lesser degree of crime embraced within the indictment. It was not intended to confer unlimited or unrestricted power upon the jury to find a defendant not guilty of a higher degree, but guilty of a lesser degree when the law and the evidence may not so warrant. It does not require the court to instruct the jury on every degree of crime that may be embraced within the indictment when there is no evidence upon which to base a charge.

It is important to observe that our notion about the propriety or necessity of charging the law concerning every grade of homicide had its origin from an early day when the statute was materially different. Originally it provided:

“That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict, whether it be murder in the first degree or second degree, or manslaughter.” *Swan’s Sts.*, 275.

In early cases it was considered that

“the crime of murder in the first degree includes all the constituent elements of the lower grades of homicide; and there can be no question but that, in the state of the pleadings, the prisoner might, legally, have been found guilty, either of murder in the second degree, or of manslaughter.

“Whether the homicide act was committed purposely or otherwise, with or without malice, or with or without deliberation or premeditation, were questions of fact to which it was the exclusive right and province of the jury, upon consideration of the evidence, to respond. Whilst it was the right and duty of the court to pass upon the competency of the evidence offered, as well as to determine all other questions of law arising in the progress of the trial; yet the credibility, weight and effect of the evidence, when offered, the jury were the sole judges.” *Beaudien v. State*, 8 O. S., 634; *Robbins v. State*, 8 O. S., 131.

It has been assumed that the jury shall be left to ascertain and determine the degree of crime embraced in the technical charge, but without regard to the evidence.

But careful study of the decisions will disclose that it has been considered that the jury may find an accused guilty of a

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lesser degree of crime embraced within the indictment *only where the evidence justifies it*. *Marts v. State*, 26 O. S., 162; *Lindsey v. State*, 69 O. S., 215.

It is recognized in *Marts v. State*, *supra*, that:

“It is true that if death resulted from the unlawful assault and battery, an assailant was guilty of manslaughter.”

And it was also observed that:

“Had the court charged the jury, that if they found that death resulted from the assault and battery, they could not properly find him guilty of assault and battery only, the charge would have been correct.”

In dealing with the applicability of the statute to homicide cases it is essential to mete that two distinct types of homicide are embraced within or provided by Section 11400.

The first kind of homicide consists in killing a person purposely and with deliberate and premeditated malice.

The other is taking life while perpetrating or attempting to perpetrate the crime of rape, arson, robbery, burglarly or by means of poison.

The truth is that the original language of our homicide statutes were clearer in expression than they now are. See *Swan's Sts.*, p. 269.

Purposely killing another with deliberate and premeditated malice involves an intent and condition of mind wholly unlike and different from that present in first degree murder by one perpetrating any one of the crimes mentioned.

The intent to kill and malice in the act of purposely killing with deliberate and premeditated malice, is specific and express. In the other type it is made intentional and malicious by presumption of law, the turpitude of the act supplying the intent and malice.

So when we come to the question of operation of Section 13692, it must be observed that, in general, a charge of first degree murder while perpetrating rape, arson, robbery, by means of poison, etc., may not embrace the lesser degrees of the crime. In exceptional cases the lesser degrees may possibly be included.

If one kills another while committing the crime of either rape, arson, robbery or burglary, or while administering poison, as

White, J., stated, in *Dresback v. State, supra*, he must be guilty of first degree murder, or not guilty of any crime at all. He can not be guilty of second degree murder, because having killed by means of poison, or when committing any of the other crimes, he does not do the killing "purposely and maliciously, but without deliberation and premeditation" within the meaning of the second degree statute. Section 12403. This was the language of the original statute. See old Swan's Sts., page 269.

A person killing another while committing the act of rape, arson, robbery or burglarly, or by administering poison, can not be guilty of manslaughter, because it is not done without malice, nor is it done upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act.

Killing another while committing the act of rape, arson, robbery, or burglary, or while administering poison, is not killing unintentionally while the slayer is in the commission of some unlawful act, because the statute specifically imputes to the slayer an intention of committing the crime of first degree murder, to the exclusion of the lesser degrees of first degree homicide embraced within a purposely killing with deliberate and premeditated malice.

The intention of Section 13962, was "doubtless to class certain homicides in the highest degree of murder without containing the ingredient of premeditation, malice and intention, which otherwise could not possibly be of a higher degree than manslaughter, and in many cases, might not amount to criminal homicide at all." Quotation from *Bisset v. State*, 53 Ind., 408, by Dans, J., in *Conrad v. State*, 75 O. S., 52, 67.

Dresback v. State, 38 O. S., 365, was a charge of first degree murder by administering poison, and not with purposely killing another with deliberate and premeditated malice. No doubt it was for this reason, as well as for the further reason that the distinction between the two types of murder was not present in the mind of the court in *Lindsey v. State*, 69 O. S., that caused Spear J., in the latter case to observe that:

"Owing to the meagerness of the statement we are unable to ascertain exactly what the facts in this case were, and are not disposed to comment at length upon the decision more than to say that the report has puzzled many legal minds."

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Scott, J., in *Dresback v. State* evidently regarded murder committed by poison as a type of homicide that according to the law and the evidence before the court did not embrace the lesser grades of homicide; that in view of the claim of defense that the poison was put in the pills by the doctor who prepared them and that defendant had no knowledge of the presence of the poison, presented a sharp issue whether the accused was guilty of first degree murder or not guilty at all. In view of the law and the evidence it was held to be prejudicial to prejudice the defendant as to his defense by injecting into the case of the issue of second degree murder of which he could not be legally found guilty at all.

Dresback v. State therefore stands the test of reason and law better than does *Lindsey v. State*, 60 O. S., 215, which was a charge of first degree murder while in the perpetration of robbery. The accused killed the deceased with a revolver.

The indictment not only charged the murder to have been committed while perpetrating robbery, but also charged defendant with having unlawfully and purposely killed and murdered by means of shooting, inflicting a mortal blow from which death instantly resulted.

The form of indictment was upheld, and a conviction of murder in the second degree was sustained. Second degree murder was probably sufficiently charged.

An indictment in such a case where a deadly weapon was used and while committing robbery might be framed with two counts so as to cover both types of homicide, but the indictment in this case is not a model, nor does the decision show proper appreciation of the homicide statutes.

The authorities in other jurisdictions fully support the views expressed in this opinion concerning the types of homicide, and the rules applicable thereto.

In murder in the first degree committed while perpetrating any one of the crimes named, the intent and malice is to be presumed from the heinousness of the act. If it is held to be with express intent or express malice, it is made so by statute. The correct conception, however, appears to be that it is to be presumed by law to have been intentionally, and maliciously by

force of the statute. See in support of this *Gonzales v. State*, 19 Tex. Cr. Rep., 394; *Pumphrey v. State*, 84 Neb., 636; *Com. v. Hanlon*, 3 Brewst., 461; 8 Phila., 401; *State v. Gray*, 19 Neb., 212; *State v. Mangana*, 33 Nev., 511.

This is wholly unlike intent and malice in second degree murder embraced within the charge of purposely killing with deliberate and premeditated malice. In such case there is no presumption of intent and malice, it being a matter of inference for the jury from the nature of the act. This furnishes another reason for the claim that there are two types of first degree, and that generally the second type does not embrace the lesser degrees.

The rule in other jurisdictions is that murder committed while perpetrating rape, arson, robbery, poison, etc., eliminates the lower degrees of murder in the second degree, manslaughter, assault, assault and battery. *Milo v. State*, 59 Tex. Cr. Rep., 196; *Michie Hom.*, Sec. 18, p. 18; *State v. Sexton*, 147 Mo., 89; *Dresback v. State*, 38 O. S., and *State v. Lukens*, 6 N. P., 363, 367, also support the doctrine.

It was distinctly stated that the statute which divides crimes into degrees and which requires the jury to find in the lesser degree in case of doubt, should not be applied in a case of murder in the perpetration of a robbery, because a murder so committed is not divisible into degrees.

In *State v. Thorne*, 41 Utah, 414; Ann. Cas. 1915 D., a request was made by the accused asking that the jury be charged that it might find defendant guilty of either murder in the first degree, or murder in the second degree. The court refused, and charged the jury that they could find defendant guilty of murder in the first degree with or without recommendation, or not guilty.

It was held that:

“The court’s charge was proper. *There was no evidence upon which the jury could base a verdict of second degree murder. Under the undisputed evidence and under his own admissions appellant was guilty of murder in the first degree, or he was not guilty at all.*”

In *State v. Spivey*, 151 N. C., 676, it is stated:

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“If * * * there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions to submit that view to the jury. *It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder.* This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence in the best light for the prisoner, can the inference of murder in the second degree or manslaughter be fairly deduced therefrom.”

In *Essery v. State*, 72 Tex. Cr., 414, it was said:

“When the code said murder committed in a certain way was murder in the first degree, the law makes it so, and a jury by its verdict could not find otherwise.”

In *People v. Schleiman*, 197 N. Y., 383; 18 Ann. Cas., 588; 27 L. R. A. (N.S.), 1075, it is stated:

“The conditions are exceptional, * * * which warrant a refusal to instruct the jury as to their power to convict of a lower degree of crime charged for which the defendant is on trial and great care should be observed, * * * not to withhold such instruction unless the case is one like that before us, where there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal.”

The decisions cited from other jurisdictions, some of them being of the second type of first degree murder—not being with deliberate and premeditated malice, support the position sought to be maintained in this opinion. That is in any case of murder with deliberate and premeditated malice, the function of the court is to determine whether there is *any* evidence that *tends* to support any lesser degree; if there is, then to state the issue, give appropriate instruction and submit proper form of verdict.

In this case the killing was purposely done with a deadly weapon calculated to cause death, supported by strong evidence tending to show adequate provocation, or assault and battery. A form of verdict for manslaughter was submitted with an instruction which left it to the jury to decide whether there was

provocation. But no forms of verdict for assault and battery were submitted, and no charge in respect thereto.

We think the verdict of murder in the first degree is supported by the law and the evidence.

The motion for new trial is overruled.

AS TO THE COUNTING OF BALLOTS IRREGULARLY MARKED.

Common Pleas Court of Cuyahoga County.

ALVA R. DITTRICK V. JAMES T. KELLY; AND EIGHT OTHER SIMILAR CASES.*

Decided, February 15. 1917.

Elections—Contest of—Irregular Markings of Ballots—Intention of Voter Controls Where It Can be Discovered—Slovenly Work in Making the Count—Prima Facie Case of Fraud, Error or Mistake Not Shown, When.

1. A contested election is a judicial hearing, and the court is at liberty to consider and determine the credibility of witnesses and give such credence to their testimony as seems to be justified.
2. It is competent in such a contest for judges and clerks of election to testify as to the manner in which certain ballots were counted.
3. The placing of a cross-mark at a presidential election opposite the name of one of the candidates for President, instead of in the place intended for such mark, indicates an intention to vote the straight ticket of the party by whom said candidate had been nominated, and the ballot should be so counted.
4. A *prima facie* case of fraud, error or mistake in an election count is not shown by the mere pointing out of some errors in the count; nor by assuming that the ratio of errors discovered in a few precincts applied to the entire election district; nor by a showing of errors in a few precincts which were prejudicial to the contestants, where no attempt has been made to discover those which were prejudicial to the contestees; and in the absence of direct proof that errors were made in the count sufficient in number to change

*Affirmed by the Court of Appeals, June 4, 1917.

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the result of the election, judgment must be entered for the contestants.

At the November election, 1916, Frank T. Andrews, Joseph Menning and James T. Kelly were the Democratic candidates for the office of county commissioners, and each received, respectively, 63,471, 61,314 and 59,131 votes. Fred R. Kohler, Alva R. Dittrick and John A. McDonald were the candidates on the Republican ticket for county commissioners, and received, respectively, 56,574, 56,609 and 55,414 votes. Following the election, the board of deputy state supervisors of election declared Andrews, Menning and Kelly elected as county commissioners of Cuyahoga county, Ohio. Said candidates Kohler, Dittrick and McDonald each filed notice of appeal against each one of the Democratic candidates declared elected, and the nine cases were consolidated by an order of court, and combined with case No. 153105. There were approximately 133,000 votes cast at said election, and in the county of Cuyahoga at said election there were 568 precincts.

LIEGHLEY, J.

This is an appeal by each of the three defeated candidates, under Sections 5148 to 5153 and 5090-1.

During the hearing, about eighty witnesses were examined, eighteen of whom were Republican clerks and judges of election, and the other witnesses who were examined were party witnesses to the count in the booths on the night of the election.

The court assumes that this is a judicial inquiry, and consequently the court may regard and consider and determine the credibility of the witnesses. The testimony of a number of the witnesses is not at all satisfactory. The court is unable to reconcile the variance in the testimony of Wenger, judge, and Coleman, judge of elections, in Booth G, Ward 2; also Rohringer, a witness, and Wetzel, judge, in Precinct I, Ward 18. The testimony of the witness Goettling, when compared with the transcript of the vote in Ward 4, Precinct B, East Cleveland, is unsatisfactory. Likewise Schuh, who testified there were 51 straight Republican ballots, yet Dittrick and McDonald received

only 48 and 44 votes, respectively. The testimony of Sidney V. Thompson, given in two different depositions, is rendered valueless by the character of it. Compare the testimony of the witness Summerville with the vote as certified by the board of elections. A large number of the witnesses testified positively with reference to the number of ballots incorrectly counted, but have no memory of anything else in relation to what occurred in the booth on election night, nor the number of votes relating to any other subject-matter than that of interest in this law suit. Some of the witnesses saw only the Democratic tickets, and no Republican ballots, straight or split. It further appears that the attention of some of the witnesses was first called to the manner of the count of some split ballots by the election officers some weeks after when the witnesses were inquired of in certain rooms in the city, called to those rooms for the specific purpose. No one carefully reviewing the proof offered in this contest could give full credence to what has been testified to as shown by the record. In fact, the many discrepancies and contradictions require a liberal discount from the claims made therefor.

The original tally sheet of the election in question, duly certified by the officers thereof, is *prima facie* evidence of the election of the contestees in this case. 21 O. S., 216; 26 O. S., 549; 106 Minn., 393-427.

Elections belong to the political branch of the government, and not the judicial, and are not *per se* the subject of judicial cognizance, but are matters for political regulation. The power of the courts to determine election contests is purely statutory. They have no inherent common law or equity powers over elections. 89 O. S., 396; 90 O. S., 311; 106 Minn., 393.

It was claimed by the contestees that the judges and clerks of election were, but should not be, permitted to testify, which claim was overruled by the court, and, as we believe, correctly so. Judges and clerks of election are not permitted to take the stand and swear that their returns were false and untrue. But judges and clerks may be inquired of in respect to the manner

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in which certain ballots were counted. 5 C.C.(N.S.), 119-125; 64 O. S., 89-96.

It is claimed by the contestants that about 325 ballots marked with a cross opposite or in front of the name of Woodrow Wilson were counted incorrectly as straight Democratic tickets. There are a number of reputable authorities of other states supporting the claims of contestants. Section 5070, subsection 9, provides:

“No ballot shall be rejected for any technical error which does not make it impossible to determine the voter’s choice.”

In view of the large interest taken by the electors in this county in the election of November, 1916, the prominence which the candidacy of Cox attained against the candidacy of Willis, the activities of the various candidates for county office, and the further fact that those ballots so marked average four or five per precinct, can it be claimed that those voters intended to vote for Wilson only? Some such ballots were marked in the same manner opposite the name of Hughes on the Republican ticket. Doubtless full examination of the ballots would disclose that an equal number so marked the Republican ballot. What was the intention of each voter? In the instance of a voter placing his cross in front of the name of a presidential elector, one for whom the voter directly exercises the right of franchise, the ballot must be counted for that elector only, for in that case the intention must be deemed to have been to vote for the elector marked; but in the instance of a cross in front of the name of either Wilson or Hughes, the voter does not vote for either one directly, but his cross appears at the top of the ballot, not in the place designated by statute that the same shall be placed. This court is of the opinion that the intention of said voters was to vote the straight ticket.

“Ballots marked with a cross at the head of a particular party column, although outside the square containing the party device, are to be counted for the candidates of that party.” 98 Ky., 596; *State, ex rel, v. Markley*, 9 C.C.(N.S.), 560.

“The right of suffrage should not be denied to a voter because of his failure to follow the strict letter of the law in

the marking of his ballot, and while laxity in the marking of ballots by those who know how should not be encouraged, yet in the case of irregular markings and erasures by a voter who is evidently actuated with an honest purpose, his ballot should be counted if his intention can be ascertained with reasonable certainty." 18 N. P., 500; 92 O. S., 101-112.

Section 5070 is not mandatory but directory. 158 Ill., 609-17; 92 O. S., 101-112.

It is not surprising that a voter who is called upon but once a year to exercise his right of franchise should sometimes mark his ballot at variance with the requirement of the statute. If he, in a sufficiently clear manner, evidences his intention, that intention should override the directions of the statute. Therefore, it is my opinion that these ballots with the cross opposite the name of either Wilson or Hughes should be counted as straight Democratic or straight Republican tickets, and as a vote for all the candidates appearing on said ticket.

However, it is far different with the clerks and judges of elections in the various booths throughout the county referred to in this case. These men are presumed to know the method of counting ballots. They receive instructions and have before them printed rules for counting the same, and sample ballots marked with directions how to count the ballots so marked. Yet in the face of all their supposed intelligence on the subject, and despite all the instructions and schooling provided them, the monumental ignorance displayed in the proof in this case of the correct manner of counting split tickets can not be accounted for on any other theory than lack of intelligence or indifference. It is a matter that deserves the earnest attention of the board of deputy state supervisors of elections of this county in an earnest effort to correct a situation apparently appalling, even after a proper discount is made from the proof offered in this case by reason of lack of credibility of witnesses in some instances.

The burden rests upon the contestants to establish their claims. 25 Hun, 456; 106 Minn., 393-427.

It has been the well-established law that the burden rests upon the contestants to show that there was either error, mis-

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take or fraud in the count of the ballots, and that that error, mistake or fraud was prejudicial to the contestants, which means that the error, mistake or fraud was of such volume as would probably change the result of the election. In this case no fraud is claimed. Such is the law in this state today, unless the amendment to Section 5090-1, as it appears in 106 Ohio Laws, 209, has the effect of amending the law of the state as it theretofore was.

The amendment to Section 5090-1, as the same now appears in 106 Ohio Laws, 209, was made by the addition of the following words: "after a *prima facie* case of fraud, mistake or error is shown." It was practically conceded by counsel for contestants at the hearing that the law was as above stated before said amendment. It is now claimed by the contestants that they have shown by proof that substantially 1,200 ballots are affected by claimed errors in counting thereof, which amounts to over 10 errors on the average per precinct. And if it may be presumed, and it is claimed by counsel for contestants that it may, that that average amount of errors would continue throughout all the precincts to which no testimony was directed, then in that event the result of the election as declared by the board of elections would be different, and Kohler, Dittrick and McDonald would be elected.

Assuming that the 325 ballots marked with a cross opposite the name of Wilson were incorrectly counted, the 1,200 ballots affected by the testimony offered could not change the result; and if it be a requirement of the law that sufficient number of ballots must be questioned, then this case is ended. In the case of *Tarr v. Priest*, 93 O. S., 199, only those ballots were counted of the various precincts with reference to which errors were alleged and claimed to have been made in the count.

What does *prima facie* case of fraud, error or mistake mean? Does it mean the mere showing of some errors, as claimed by the contestants? Was there ever an election held, and could there be one held, from the lessons taught us in this case, in which it would be impossible to show some errors in the count? If that is all that is necessary to be shown, then the court would be obliged to order a recount of every election.

But counsel for contestants claim that inasmuch as they have shown an average discrepancy in the count of over ten per precinct, that therefore the presumption arises that that average amount of errors occurred throughout the other precincts.

"There is no presumption that errors found will continue throughout the unattacked precincts or precincts in which there is no proof of error shown." 106 Minn., 393-427.

If the essential elements of error or mistake, and that that error or mistake prejudiced the contestants, and that the prejudice must take the form of erroneously counted ballots in such number as to have changed the result as a rule of law, has been changed by the amendment of the statute in 1915 by inserting the *prima facie* case phrase, then what amount of proof is necessary to warrant a court in ordering a recount of the ballots? Will a mere showing of an average amount of errors per precinct constitute a *prima facie* case? If it does, then it seems to me that the evidence should be of such character that it would be some proof in support of all the necessary requirements to warrant the court in ordering a recount under the former rule, and the evidence in support of the claims of the contestants that he has established an average of errors per precinct should be clear and satisfactory.

"*Prima facie* evidence of a fact is such evidence as in judgment of law is sufficient to establish the fact, and, if not rebutted, remains sufficient for the purpose." 97 U. S., 268.

Can proof be said to be clear and satisfactory in reference to the erroneous counting of ballots when the evidence in respect thereto relates to only one side of the ledger? This case is similar to a claim of A that B owes him, and a claim of B that A owes B, and in A's attempt to show and establish his claim, he shows errors only on one side of the ledger account, consisting of 568 transactions, without any showing as to the other side of the ledger account, except to the extent that the court made inquiry from time to time during the progress of the hearing, and which amounted to perhaps one-fifth of the witnesses called, and which disclosed that in the case of those inquired of, there

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were similar errors on the other side of the ledger. It appears to me that if a *prima facie* case may be said to have been established by showing an average of errors per precinct, that the burden rests upon the contestants to show by evidence tending to prove at least that the average of errors per precinct is substantial and in fact exists from an examination of the ballots of both parties.

There is a presumption that the certified canvas of the election officers is *prima facie* correct, and to offset or overthrow that presumption requires at least some affirmative proof. Unless some proof is offered, the returns in the other precincts are correct. Inasmuch as they are presumed to be correct, reason for ordering a recount must be found in the precincts to which the testimony and evidence has been directed. Accepting the proof at its very best, only 1,200 ballots were affected. The plurality of Kelly over Dittrick is 2,522 votes. In no manner of counting, by addition or subtraction, could those 1,200 ballots change the result; and therefore Dittrick is not prejudiced by the careless and ignorant mistakes of the election officers in charge in the 75 booths in which these 1,200 ballots are claimed to have been erroneously counted.

For these reasons, the court will dismiss the appeals in all the cases, and enter judgment for the contestees. All costs taxed against the contestants.

FAILURE TO JOURNALIZE A DECREE OF DIVORCE.

Common Pleas Court of Licking County.

GEORGE SMITH v. BESSIE SMITH.*

Decided, April Term, 1916.

Divorce—Motion for a New Trial Does Not Lie, When—Decree May be Entered Nunc Pro Tunc at a Subsequent Term.

1. A motion for a new trial does not lie in a divorce case in which alimony is not involved.
2. Where at the conclusion of the hearing of a divorce case the court announces the granting of a decree, but owing to the inability of counsel to agree no entry was made on the journal, the court may at a subsequent term order that a decree be entered as of the date of the hearing and determination of the case.

J. W. Horner, for plaintiff.

Smythe & Smythe, contra.

FULTON, J. (orally).

This case, which is for divorce, was heard by this court upon the evidence some time in December, 1915. On the 20th day of December, 1915, the court made the following entry upon its docket: "Divorce granted to plaintiff upon the ground that defendant was guilty of adultery, as charged in the petition." A motion for new trial was filed within three days. But I will say, before I come to that, the order of the court was not journalized. A journal entry was prepared, but it was not agreed to by counsel on either side, and it was never put upon the journal.

There was a case tried in Mt. Vernon by Judge Seward, in which Judge Seward granted a divorce and announced his decision from the bench and entered it upon the minutes of the court. When he went down stairs shortly after that, he saw the

*Petition in error dismissed by the Court of Appeals at the cost of the plaintiff in error.

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party to whom he had granted the divorce in the probate court getting a license to be married again. This caused him to go back and erase from the docket the order he had made and it never was journalized. The party securing the divorce took that case to the circuit court, or court of appeals, and Judge Seward was reversed. The court of appeals held, as I understand it, that when he announced the decision, that that was the decision of the court, and he had no right to change it or erase it or modify it, and they reversed him and held that although the matter was not journalized when he announced it from the bench, it was the decision of that court.

Now, our court of appeals held recently in the case of *Holland v. Holland* that an action for divorce and alimony is not a chancery case in any sense of the word, but is an action wholly provided for and regulated by statute. The statutes regulating divorce proceedings begin at Section 11979 and close with 12003, and if the proceeding is purely statutory, all the matters regulating the divorce are contained in the sections between those two numbers.

Now this court thinks that it is not the policy of the courts or the Legislature that a divorce case which has been once tried shall be heard by another court after a divorce has been granted by the court first hearing the matter. One reason why I think that is so is because Section 12002, which provides for appeals, but only for appeal in a matter where alimony has been allowed. The statute reads: —

“No appeal shall be allowed from a judgment or order of the common pleas court under this chapter except from an order dismissing the petition without final hearing or from a final order or judgment granting or refusing alimony, or in cases under the next preceding section. When judgment is rendered for both divorce and alimony the appeal will lie only to so much of the judgment as relates to the alimony. When an appeal is taken by the wife she shall not be required to give bond.”

Now the court thinks that the Legislature has said that when a divorce is granted by the court that that is an end of it, that is final; they do not allow any appeal to be taken. You can

take the alimony feature up and have that heard over again, but you can not take up the divorce part of it and have that heard over again by appeal.

The question raised in this case is as to whether or not you can file a motion for new trial and have the case heard over again in that manner. Take those sections of the statute and read every section there is from 11979 to 12003 and you can not find a single word in any of those sections which refers to the taking of the case up on error. There is no such section. There is no provision for it.

Our court of appeals has said that this matter is purely statutory; it is regulated by statute. If it is regulated by statute, and all the matters in regard to divorce and alimony are in those sections, then there is no provision for a motion for a new trial, because there is nothing which grants the right to file a motion for new trial. But it is contended by the defendant that that comes under the other sections of the statute in which you may take exceptions to any final order that is made. This court does not think so, and will strike from the files this motion for a new trial, and there may be exceptions taken. And the court will order that the divorce which was granted on the 20th of December be journalized by a *nunc pro tunc* entry as of that date; it may go on the journal as of that date, and there may be exceptions, and if the defendant desires to take it to the court of appeals, it can easily be done upon the ground that the court struck the motion for a new trial from the files.

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State v. Kingcade.

**DETERMINATION BY THE COURT AS TO THE DEGREE OF
CRIME COMMITTED.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. LUTHER KINGCADE.

Decided, May 25, 1917.

Criminal Law—Accused Pleads Guilty of Murder—Degree of Crime Determined by the Court—Purpose to Kill May be Implied from Atrocious Acts—Testimony Tending to Show Self-Defense and Provocation—Application of the Rule as to Reasonable Doubt.

1. In the case of one convicted by confession in open court in a capital case, it is permissible to hear testimony in support of claims of provocation and self-defense for the purpose of reducing the grade of the crime to manslaughter.
2. The reasonable doubt rule inures for the benefit of the defendant where the degree of crime is to be determined by the court as well as where it is left to a jury.
3. Extraordinary cruel, brutal and atrocious acts on the part of the defendant in connection with the commission of the crime warrant an inference of implied malice and a purpose to kill.
4. Where the victim was killed by blows and kicks, inflicted in two attacks separated by a short interval of time, and it is uncertain whether the fatal blow was inflicted during the first or second attack, and the only evidence of a purpose to kill was a threat uttered during the interval between the attacks, an application of the reasonable doubt rule requires that the crime be fixed at murder in the second degree.

Robert P. Duncan and Hugo N. Schlesinger, for plaintiff.
C. D. Saviers, E. D. Howard and W. E. King, contra.

KINKEAD, J.

The defendant is indicted for murder in the first degree.

It is charged that defendant with deliberate and premeditated malice cast and threw his wife, Emma, upon the floor; that while so lying upon the floor, the defendant struck, beat and kicked her upon the head, stomach, back and sides; that he cast and

threw her to the floor by striking and beating her with both hands and feet. Her body from her knees to her head was covered all over with bruises. Her face was bruised; there was a cut in her lip; there was a cut behind the ear. Blood was spattered on the walls of three rooms in the house; she was nude when found; hair was found around the rooms and on defendant's clothes. Blood was found on defendant's underclothes from his knees down. The kitchen floor and that of another room had been washed up; partly bloody clothes of the woman were found in a receptacle showing that they had had blood washed out of them; the house was generally torn up disclosing that there had been a struggle between husband and wife. Defendant is colored and the wife white. He is strong and brawny, his face and evasive eyes tend to show a disposition easily stirred to anger, viciousness and brutality.

The homicide occurred after midnight on Saturday. He had gambled Saturday and having won some money, he indulged liberally in drink. He took his wife home from a saloon and returned continuing drinking until closing time, going to his home in a taxi. He met his wife, who had a guest with her keeping her company, in a very cordial manner. Both he and his wife were in good humor. The guest left the house at about 1 A. M.

A neighbor about fifty feet away was awakened by hearing the wife scream. She later heard the husband call to his wife from the outside of the house. The witness got up from bed on hearing the first screams which awakened her and went to the window. She went back to bed, and heard the wife scream again; she went to the window and saw the husband out in the yard and heard him say: "Come on out if you think I am drunk, by God." She heard the wife answer that she could not come out because he had pretty near killed her; and heard the husband tell her if she did not come out—to get her clothes on and come out or he would come in and finish her.

This was about 2 o'clock A. M., the witness stated. The witness saw him go back in the house. After he went back in the

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house she heard the wife scream once more, and heard nothing after that.

There were lights in the house which were extinguished not long after the husband went in the house; it was after the witness heard the last scream.

About 3 A. M. the defendant went to a nearby cement plant, woke up the night watchman and told him that some one had murdered his wife. Police officers were then called and to them and later at police station he continued to give the false account of the affair. Finally, however, he voluntarily confessed to the killing at the police station. He stated that he and his wife had some argument a day or two before, and he went home drunk and crazy and started an argument. He states that he must have started into an argument; that the killing was done through fighting, that he was just crazy; that he did not know that he choked her; that whiskey was the cause of it; the only reason for having done it, he says, was jealousy and being full of whiskey; that he would not have done it if he had not been drinking; that he thought more of his wife than he did of his own soul; that he did not plan it, because when he left her and went back up town Saturday night, he left her in a good humor.

In his testimony he states that after he returned home his wife accused him of having gone back to town to be with a woman, and called the woman a whore; he states that he pulled off one shoe and had taken off his top coat and sweater, and was reading the paper, when she went out of the door; that he dozed off to sleep; when she came back she woke him up and said: "I was over there to see that bitch but I could not get in. I will see her in the morning"; that she pulled out a note, and asked him where he got it. Then he recites that he had gotten a note through a little boy which he had put in his pocket, and had taken it out and left it at home, and that he supposes she had gotten it.

He states that he started to bed, and as near as he can remember he was sitting on the side of the bed and she says: "If you go to sleep here tonight I will cut your God damn

throat." He says that she got the razor out of the drawer or out of the pitcher, and in the scuffle with her getting the razor out of her hand he cut his hand. He indicated a scratch on his arm. He states that he thought he threw the razor on the side of the bed and then sat on the side of the bed and talked, and they kept "fussing," when he claims to have finally stated: "Well, I will go away if we have to argue all night; I will go some place and stay until morning and maybe you will feel better in the morning."

He then states that he put on his shoe, that the lamp was on the center table or wash stand, that she threw the lamp over; that it struck him, and flew on papers which caught fire; he stepped into the kitchen, got a dish of water and threw it in the house on her and the paper; that he got a bucket of water and threw it on the paper and put the fire out.

He claims to have stood there a second or two—that he supposes she went and pulled her clothes off—he was in the bed room—thinks he went to get water—came back—told her he was going out—told her he would go to Mr. N.—, a friend, started to go—when he started to go out the door she was undressed—pulled all her clothes off—she said: "If you go out that door tonight I will blow your God damn brains out"; he was going out of the bed room—when he started to go out the door, his wife got the pistol out of the drawer and when she threw the pistol up he knocked it down—he supposes because it did not hit him it must have went off in the floor or somewhere in the room—and the fight, he says, started right there—and that is about as much as he can remember.

He states the razor was lying on the floor, and was picked up by Donaldson, police officer.

On cross-examination he admits his wife had not touched him. When asked who started the fight he answered that he supposes she must have done so. He stated that she took off her clothes when he threw the water on her. He said nothing about the alleged razor or revolver incident in his statement at the police station. He did not state at police station that his wife

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started an argument, but on the contrary said he was drinking—was crazy—and started an argument.

In response to a question by the court, whether he kicked his wife—he stated: “I don’t remember using anything—whatever I used, but suppose I must have used my hands and feet as much as I can remember.” “As I said as has been explained to me since I have been arrested and all, it looks as though I must have kicked her and used my hands.”

In his admissions at the police station he stated that he had beaten his wife before but that he had gone too far.

Before the coroner, defendant said he was sorry—didn’t mean to do it. Said he had given her more that she could stand—that he had beaten her before.

The revolver was found by the officers in the dresser drawer; drawer was closed. Examinations of the revolver disclosed it had not been used; the razor was found in the dresser.

If defendant’s wife had used the razor and the revolver as claimed by him and if either was lying on the floor, it is unlikely that defendant would have put either back in the dresser drawer.

The finding from the evidence is that defendant killed his wife without any provocation, by beating and kicking her. His claim that she made an attack upon him with a razor or revolver is not worthy of belief and is not consistent with his own admissions and the facts and circumstances disclosed by the evidence.

The body was covered with a mass of bruises from head to foot—one solid mass of bruises; the left kidney was torn loose from its fastenings, the ribs were fractured, one or both lungs were punctured.

Death was due to internal hemorrhage due to external violence. The primary cause was the fact of the artery of the left kidney being torn—being torn from the kidney and the ribs puncturing—the broken ribs puncturing the lungs.

The secondary cause of the death was hemorrhage. The wounds were necessarily fatal. It required a very severe blow to loosen the kidney.

Some question is raised whether on conviction by confession in open court in a capital case the defendant may be permitted to claim self-defense. In this case it is claimed that the wife attacked the accused first with a razor, then with a revolver, she having fired the same, and that this started the fight.

Such evidence may be considered as presenting a claim of self-defense, as well as of provocation, reducing the grade to manslaughter.

Without regard to the verity of the testimony, which comes solely from the prisoner, some consideration is given to the question because of its novelty and importance.

A further question arises whether in considering the evidence and arriving at a conclusion concerning the degree of the crime, the reasonable doubt rule of evidence should apply and inure to the benefit of the defendant.

"By a plea of not guilty (the defendant) denies and puts in issue every material fact alleged in the indictment, thus imposing upon (the prosecutor) the state the burden of proving them." *Craig v. State*, 49 O. S., 417.

A plea of guilty to an indictment for murder in the first degree is in its nature a judicial confession of the truth of both deliberation and premeditation as well as all other allegations in the indictment. It is an admission of every material fact well pleaded in the indictment.

The provision forbidding the extreme sentence for the capital crime, and making it the duty of the court to hear witnesses and determine the degree of the offense is a humane provision for the benefit of the accused, to insure the pronouncement of the sentence according to law regardless of the plea of guilty.

It is mandatory that "the court shall examine the witnesses, and determine the degree of the crime, and pronounce sentence accordingly" when the accused is "convicted by confession in open court."

There is no guide in the statute whether or not the same rules of trial shall apply.

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To examine the witnesses and determine the degree of the crime requires the same consideration of evidence and law as if the facts were to be determined by a jury. This necessitates the application of the reasonable doubt rule.

A plea of self-defense, however, is inconsistent with a plea of guilty.

The court being of the opinion that the testimony of the prisoner concerning the alleged attack by his wife with a razor or revolver is unworthy of belief, disposes of any suggestion of self-defense.

Of what degree of homicide is defendant guilty?

Murder in the first degree consists in purposely taking a human life with deliberate and premeditated malice, or while, and maliciously, without deliberation and premeditation. *Code*, Section 12400.

Murder in the second degree is the taking of life purposely and maliciously, with deliberation and premeditation. *Code*, Section 12403. Intent to maliciously kill must be shown.

Manslaughter is the unlawful killing of another, either upon a sudden quarrel, or while in the commission of an unlawful act. *Code*, Section 12044; *Johnson v. State*, 66 O. S., 59.

Malice is the essence of murder in the first and second degree, may be present in manslaughter, but is not an essential. *Cline v. State*, 43 O. S., 332; *Erwin v. State*, 29 O. S., 186; *Nichols v. State*, 8 O. S., 435.

In first degree murder malice must be express, while in second degree it must be implied.

In first degree homicide express malice may be indicated by facts and circumstances which show a deliberately formed purpose to take life.

In second degree murder implied malice may be shown by cruel acts, inhuman and atrocious conduct indicating a reckless disregard of human life though unaccompanied with a deliberate design to take life.

Express malice in first degree murder is descriptive of the state of mind and intent of the slayer, implying an act of his

will, intention or design to do the act (12 O., 483). The killing of a person with a sedate, deliberate mind, and formed design, is the result of express, deliberate and premeditated malice.

If the design or intention to take life be but the conception of a moment, it is sufficient if the slayer had time for thought for a moment, did intend to kill, the killing must be considered to be both deliberate and premeditated.

Implied malice, the essential characteristic of second degree murder, indicative of the mind and intent of the slayer, is merely an inference or conclusion of fact and law from the facts and circumstances proved. It does not involve a formed purpose or design.

Where the killing is without design and premeditation, but is under the influence or is prompted by a wicked and depraved mind, or is with a cruel and wicked indifference to human life, or is the result of atrocious acts of cruelty, the law implies malice, and makes the offense murder in the second degree.

Malice is implied by law from every unlawful and cruel act however suddenly committed; the law contemplates that one doing an unlawful and cruel act voluntarily does it maliciously. If death ensues from an unlawful and cruel act of the slayer, without adequate or sufficient provocation, the law implies that such act was done maliciously, and the crime is murder in the second degree.

Manslaughter is where a person unlawfully kills another without thought or intent to kill, and without malice.

If one in a sudden affray, in the heat of blood, or in a transport of passion, inflicts a mortal wound, without time for reflection, or for the passions to cool, with adequate provocation, it is manslaughter.

Manslaughter results not from a wicked and depraved spirit, or malice aforethought, but from provocation to kill—so great as to produce a transport of passion which for the time being renders the person deaf to the voice of reason.

With these fundamentals of the grades in mind the task of deciding the degree of defendant's guilt is undertaken.

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Before considering the effect of the threat made by the prisoner while out in the yard, attention will be given the character and nature of the mortal blow, and the legal effect to be given the same.

The acts of defendant in beating his wife with his fists and in kicking her, drawing the inference from the mass of bruises all over her body, justifies the conclusion that she was beaten in a most unusual, cruel, inhuman and atrocious manner.

The deliberate selection and use of a deadly weapon in a manner purposely calculated to cause death is a circumstance which indicates in the mind of the person committing the act a purpose or design to kill, because the person knows it will cause death. This is an inference which a jury may draw in a proper case.

It is as reasonable to apply the same rule of reason to such brutal and atrocious conduct of beating and kicking as is disclosed by the evidence in this case, showing as it does such severe injury to the body resulting in death. From such acts and conduct a jury in a proper case might be justified in drawing the inference of intent to kill. In at least one state killing by brutal and atrocious acts is raised by specific statute to first degree homicide.

In our state, however, the inference of intent to kill and of implied malice which may be drawn from the use of a deadly weapon, without further proof of threats or other acts, is insufficient to show premeditated malice and raise the grade to first degree.

The conclusion is reached in this case that it is a sound rule of law to draw the inference of purpose to kill and implied malice from the extraordinary cruel, brutal and atrocious acts of the slayer in beating his wife to a degree evidently dangerous, and in such manner as to sever the kidney from the arteries, and to pierce the lung with broken ribs, resulting in hemorrhage and death. An appropriate instruction should be given in a trial by jury, and in this case the court draws the inference of fact that the defendant intended to maliciously kill the deceased.

We have found some helpful decisions and authority bearing on this point.

Bishop states:

“Whenever a person in cool blood beats another in such a manner that he afterwards dies thereby, he is guilty of murder, however unwilling he might have been to have gone so far. If the beating, however wrongful, was neither with a deadly weapon, *not carried to a degree evidently dangerous*, and there was no intent to kill, but unfortunately death followed, the offense would be only manslaughter.” *Bishop Cr. L.*, Section —.

In *State v. Jarrott*, 1 Iredell (S. C.), 76 (1840), it was considered that if homicide be committed under such circumstances of cruelty as manifest the thoroughly wicked heart, and the facts from which it is to be inferred all distinctly appear, cruelty then becomes an inference of law.

This is the rule applicable to the use of a deadly weapon, which the court considers may be appropriately extended to the present case for the reason that the circumstances of cruelty on the part of defendant clearly manifest a thoroughly wicked, malicious and depraved mind fatally bent on destruction of life.

An interesting case, similar to the one under consideration, is *Pennsylvania v. Lewis*, Addison's Reports (Pa.), 278.

“The accused defendants—several of them—stuck together at a wedding party dance, and pushed W., 73 years old, against the wall, threw him down and fell on him, from which acts death resulted. Declarations by W. between the blows and his death that certain of the accused kicked him, that his inside was battered to a jelly by the accused.

“If W.'s death was caused by the violence of the accused, done with intent to kill, it is murder in the first degree; if merely with intent to hurt, and tending to bloodshed or death, murder in the second degree.

“The accused desisted upon complaint of W. and then repeated the conduct, throwing W. several times to the floor, and once all of the accused falling on him. They pushed W. and wife off of chairs, threw stones into house, threw him down off his porch and kicked him. They continued there all night and part of next day. There were marks of bruises on one side and thigh.”

Held: “If the death was occasioned by the violent acts of the prisoners, and if those acts were done with a design to kill, it is

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murder in the first degree, and if done without a design to kill, if with design to hurt, and tending to bloodshed or death, it is murder in the second degree; if without such intention it is manslaughter."

It is not the character of the weapon used that determines the degree. The means with which the offense was committed is not a constituent element of the crime of murder. If all the ingredients of the crime exist it is murder, no matter with what means or instrument the killing was done. Thus a murder may be committed by a blow with a fist. *Michie on Homicide*, p. 105, Section 16.

Murder in the second degree exists where the circumstances show that homicide was committed under the influence of a wicked and depraved heart, and with a cruel and reckless indifference to human life and without express malice. *Michie on Homicide*, p. 155.

State v. Hall, 132 N. C., 1094 (1903):

"And the common law does not distinguish, as our statute does, between an absolute purpose to kill and the purpose to do a grievous injury to the person; so that, if the accused assault his neighbor, intending to beat him severely, and destroys his victim, though that was not his intention, he commits murder as much as if he ran him through with a sword. *Roscoe Cr. Ev.*, 709. The use of a deadly weapon calculated to produce great bodily harm is enough at common law; and if the blow is struck maliciously, and not incautiously, it is murder. So it is murder at common law if one kills another by throwing a stone into a crowd, or riding a kicking horse through a crowd of people."

Commonwealth v. Devlin, 126 Mass., 253, 255 (1879):

"Indictment charges that the murder was caused by the defendant by beating, stamping and jumping upon her person, and kicking her upon vital portions of her prostrate body, and that these acts were repeated at intervals during the day, by reason of which she suffered prolonged agony before death.

"The statutes of Massachusetts define murder in two degrees. It is provided that when the killing is 'committed with extreme atrocity or cruelty' the crime is murder in the first degree."

Opinion, Colt, J.:

"The crime of murder always implies atrocity and cruelty in the guilty party; but there are degrees of criminality in that respect, even in the felonious and malicious taking of human life; and, in order to justify a finding of murder in the first degree, it requires that something more than the ordinary incidents of the crime shall exist—something implying more than ordinary criminality, and manifesting a degree of atrocity or cruelty which must be considered as peculiar and extreme. The nature of the question is such that it must be largely left to the determination of the jury; and when there is sufficient evidence to justify it, their findings must be conclusive.

* * * * *

"There can be no doubt that this presents a case of savage unfeeling, and long continued brutality of purpose, which fully justified the jury in finding the defendant guilty of extreme atrocity and cruelty. * * * It is enough if the means used were extreme as compared with ordinary means of producing death."

State v. Stitt, 146 N. C., 642 (1908):

"To constitute murder an unlawful and intentional taking of another's life must be shown, by killing with a deadly weapon, or under circumstances which indicate a reckless indifference to human life."

State v. John, 172 Mo., 220 (1902):

"Defendant was a dog catcher. He was in the act of catching a dog which attracted a number of persons. Some boys began barking like a dog, jeering the defendant. Defendant became incensed at boys and threatened to kill some of the crowd, and singled Richter, and without warning struck a blow upon the jaw with his fist, felling him to the sidewalk. Eight days later Richter died from the wounds.

"Defendant testified that Richter tripped him; that 'he stuck out his foot and I fell.' A strong brawny man will not be allowed to approach an unoffending citizen in a public highway and deal him a deadly blow with his fist in a vital part and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him and not to kill

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him. The facts in this case disclose unmitigated brutality—conduct much in keeping with the business in which defendant was engaged.”

Defendant found guilty of murder in second degree. It was not a case of mutual combat.

“A strong brawny man will not be allowed to deal a deadly blow with his fist in a vital part, and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him and not to kill him.” *State v. John*, 172 Mo., 22, Am. St., 513.

“It is as much murder to kill a man with his fist under circumstances of unmitigated brutality as to shoot him with a loaded revolver.” *State v. Hyland*, 144 Mo., 302.

“A person who has killed another without meaning to kill him is guilty of murder or manslaughter, the nature and extent of the injury or wrong which was actually intended most controlling importance.

“This has always been the doctrine of the common law.” *Weller v. People*, 30 Mich., 16.

Nature of the act:

“And in general,” Blackstone stated, “where an involuntary killing happens in consequence of an unlawful act, *it will be either murder or manslaughter according to the nature of the act which occasioned it*. If it be in the prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will amount only to manslaughter.”

The conception is that malice in law or implied malice does not consist of a formed design to kill. It is unlike a purpose to kill formed and thought over. To be guilty of purposely and maliciously taking life, it is not essential to have formed a design to kill. It is sufficient if the design was to strike, beat or kick another without formed intent to kill, and in striking kills, that is murder. All that is necessary is that the slayer

should have conceived the design to commit an assault, and in perpetration of such act, the person dies. That is murder in the act of assault and beating is of a brutal and atrocious character. A formed design is not essential in such kind of murder

See *State v. Alexander*, 30 S. C., 74, 14 Am. St., 879.

Mayes v. People, 106 Ill., 306; 46 Am. Rep., 698:

"It appeared that a husband, angry and drunken, without provocation threw a beer glass at his wife, which struck a lamp she was carrying, breaking it and causing it to fatally burn her.

"It was held immaterial whom he intended to strike, or whether he had any specific intent, but that the act showed an abandoned and malignant heart, and malice was implied."

See *Griffen v. State*, 40 Tex. Cr., 312; 75 Am. St., 718, where there was provocation.

Clark v. State, 117 Ala., 1; 67 Am. St., 157:

"A husband beat his wife while she was quick with child, inflicting injuries from which it died after it was born.

"There being no evidence of express malice or of an intent to take life, the injury consisting of beating the mother unlawfully, and in a manner dangerous to life, malice in such case is to be implied as distinguished from murder in the second degree."

"*Held*: An instruction for manslaughter should not be given, as the offense was murder in the second degree."

"If the act which produced death be attended with such circumstances as indicate a wicked, depraved and malignant spirit, the law will imply malice, without reference to what was passing in the prisoner's mind at the time." *State v. Levelle*, 34 S. C., 120; 27 Am. St., 799, *note*.

The foregoing authorities disclose the rule of distinction between an ordinary assault with fist or feet, and one which shows depravity of nature and cruel and reckless indifference to human life—between simple assault and one attended with more than ordinary criminality, manifesting a degree of atrocity or

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cruelty peculiar and extreme—a case such as the facts and circumstances of this case disclose, of savage and long-continued brutality of purpose—of unmitigated brutality.

Defendant can not be guilty of manslaughter because the court does not find cause of provocation reducing the crime to that grade. Even an ordinary provocation given by a woman to man of more than ordinary strength, even though it be a blow, will not lower the homicide to manslaughter. Where a blow is cruel and atrocious, provocation will not excuse it. *Com. v. Mosler*, 4 Pa. St., 264.

Clearly defendant is guilty of murder in the second degree for the reason that the unusual atrocity and brutality of the acts of beating warrants the inference and conclusion of a purpose to maliciously kill.

And if the threat made by defendant that if his wife would not come out in the yard he would go back in and finish her is to be regarded as proof of deliberate and premeditated malice, and it is clear that thereafter the mortal blow was struck, the crime is to be held as first degree murder.

The witness, Mrs. Edna Smith, heard the wife scream two or three times between one and two o'clock, which awakened her. She got up and went to the window to see who it was. She went back to bed again, then heard her scream again. Mrs. Smith looked out and saw defendant out in the yard and heard him say: "Come on out if you think I am drunk, by God." She heard the wife of defendant answer that she couldn't come out because he had pretty nearly killed her. Then she heard defendant say "if she did not come out—to get her clothes on and come out or he would come in and finish her." Immediately after saying this he "went right straight in the house."

After seeing defendant go back into the house, the witness heard the wife scream once, and then did not hear anything more. When the witness heard the above statements the lights were lit in the Kingcade house, and very shortly after hearing the last scream they were extinguished.

To state that he would go in and finish her evinced a purpose to kill and that he deliberated upon it. The scream by his wife

immediately upon his going into the house disclosed that he struck or beat her. Whether at that time he struck the blows that resulted in puncturing the lung and which tore the left kidney loose from its fastening, which resulted in hemorrhage and death, must depend upon inference. The fact that the wife screamed only once after defendant returned to the house and that the lights were extinguished would tend to show that the blow or blows then struck by defendant were the cause of death.

She was able to talk to him when he was out in the yard and it may be that she would have lived if he had not further injured her after returning to the house.

It is not reasonably certain that the mortal blow was given after the threat was made to finish her. No evidence has been offered to show how soon life would be extinguished by reason of the hemorrhage of the lung, and from the loosening of the fastenings of the kidney.

Medical authority discloses that one may live some little time after the occurrence of either or both of such hemorrhages. There is also authority for the theory that death may result from shock.

It seems entirely proper to apply the reasonable doubt rule in the solution of this question. There being, therefore, a reasonable doubt whether death resulted from the acts of defendant subsequent to his threat, or from acts prior thereto, the finding of the court is that the defendant is guilty of murder in the second degree.

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REMOVALS UNDER THE CIVIL SERVICE LAW.

Common Pleas Court of Licking County.

STATE OF OHIO, EX REL MARTIN L. SHIVELY, v. CECIL BIGBEE, AS
SAFETY DIRECTOR OF THE CITY OF NEWARK.*

Decided, April Term, 1916.

*Office and Officer—Removals from the Classified Service—No Right
of Appeal Where the Removal Was not Made in Accordance with
Law—Failure to File Charges—Mandamus.*

1. No right of appeal exists where a removal has been made from the classified service otherwise than in accordance with law.
2. Demurrer does not lie to a petition in mandamus filed by a police officer who alleges that he has been removed from office without cause and without being furnished a statement of the reasons for his removal.

FULTON, J. (orally).

This is a petition for mandamus. I will read the petition.
It is short:

"On the 29th day of December, 1913, the relator was duly appointed to the office and position of a patrolman on the police force of the city of Newark, Ohio, to serve during good behavior, and until removed therefrom for incompetency, inefficiency, drunkenness, immoral conduct, insubordination, neglect of duty or other cause.

"The salary of said office or position was fixed by law so as to entitle the relator to receive for services rendered as such patrolman, in the year 1916, the sum of \$80 per month.

"The relator held said office and position under said appointment and discharged the duties thereof until the 30th day of March, 1916, at which time, without any cause being assigned, and without any cause existing therefor, the said respondent, acting as safety director of said city, and holding said office by appointment duly made by the mayor of said city, arbitrarily compelled the relator to surrender his mace and badge, and to desist and quit acting as such patrolman, and to cease perform-

*Affirmed by the Court of Appeals without report.

ing the duties thereof, to all of which the relator objected and protested.

"The relator further says that on the 4th day of April, 1916, the said respondent, for the unlawful purpose and intent and without the exercise of any discretion on his part, and without any lawful right to exercise any discretion as to said matter, attempted to and did appoint one John Jones in the place of the relator, who was and is lawfully entitled to have and to hold said position, intending thereby to avoid his duty to permit the relator to perform the duties as patrolman of said city and to receive compensation as such.

"During all of said time the relator was ready, willing and anxious to continue serving said city as such patrolman, all of which was made known to said respondent, and all of which he well knew. During all of the time since the attempt was made by said respondent, as aforesaid, to discharge the relator from said office and position, the said city and the police department thereof was short for the services of three patrolmen whose services were necessary to the good government thereof.

"At the time your relator was removed as aforesaid from said office and position, he was the eleventh man, or patrolman under and by virtue of the ordinances of said city, and was then and ever since has been entitled by virtue of said appointment and said ordinance to hold and enjoy said office and to perform the duties thereof and to receive said compensation for the performance of said duties.

"The action of said respondent, as aforesaid, was illegal and contrary to the statutes of Ohio, and to the ordinances of said city, by reason of the matters aforesaid, and because of the facts that the relator was not removed as aforesaid for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or for any other cause whatever, neither has he become disqualified, ineligible, or incapable of holding said position.

"Wherefore the relator prays that a writ of mandamus issue out of this court requiring the respondent to show cause why he should not restore the relator to said office and position, and to permit him to continue to serve said city as such officer and patrolman; and the relator further prays that said respondent be commanded to restore to the relator his patrolman badge and mace and to restore him to said office and position."

To this petition a general demurrer is filed.

Now comes the respondent and demurs to the petition and application for a writ of mandamus for the following reasons:

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1. That this court has no jurisdiction of the subject of the action.

2. Because it is not alleged, nor does it appear in said petition, that the relator has not an adequate remedy at law.

The demurrer admits everything that is well pleaded in the petition. It admits every fact that is stated in the petition. The question is now whether that petition on its face states facts which require the court to take any action in the matter. The statutes have been changed somewhat, and the latest statute governing this subject is in 105 and 106 Ohio Laws, and it reads as follows:

“The tenure of every officer, employee or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service, but any such officer, employee or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office.

“In all cases of removal the appointing authority shall furnish such employee or subordinate with a copy of the order of removal and his reasons for the same, and give such officer, employee or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employee or subordinate shall be filed with the commission. Any such employee or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority.”

The act, it will be noticed, has been considerably changed, and it makes the duty of the removing officer different from what it was. The removing officer must furnish the man with the charges upon which he has been removed, and he can not remove him for any other cause, as the court understands it, except for the causes that are set down here as causes for removal. Now, when he is removed for any of the causes set down in this law, any such employee or subordinate so removed may appeal; that is, removed

for any of the causes set forth in the foregoing statute. It enumerates the causes for which he can be removed. Then he has the right to appeal. This statute does not seem to give him any right to appeal except for such causes. The demurrer raises the question whether he had a right to appeal. The court does not think that he had. This petition states that he was removed without any cause at all; that there was none stated. His mace was simply taken from him and his badge of office, and he was told to go. The director did not comply with the statute. The statute says that he must furnish him with a statement of the reasons for his removal—if it was incompetency, drunkenness, or whatever it may have been; he is to give him that in writing, and then he is to have the right to explain; if there is any explanation he can go and try to explain it. That is the statute. The present statute is different from the old statute in those respects.

I do not think the demurrer is well taken. This petition states the case so broadly and the demurrer admits the facts stated in the petition, and if the facts are as stated, this man certainly has a remedy here, and the demurrer will be overruled and the respondent may have any length of time he desires to take further steps in this matter.

MINORS NECESSARY PARTIES.

Common Pleas Court of Hamilton County.

JOHN F. BURNS V. BERNARD BURNS ET AL.

Decided, August 1, 1917.

Partition—Interest Held by Minors—Answers by Guardians Not Sufficient—But the Minors Themselves Must be Made Parties and Served With Summons—Full Names of All Parties to an Action Should Appear in the Caption of the Petition and Again in the Decree.

In an action for partition of property in which an interest is held by said minors, the fact that the guardians of said minors have

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been made parties and have filed answers is not sufficient, but the minors themselves must also be made defendants and be served with summons.

E. T. Brown, for plaintiff.

Frank H. Kunkel, contra.

CUSHING, J.

This is an action in partition. It appears from the record that two minors were not made parties defendant, nor served with summons. The guardians of the minors were made parties and filed answers. The question is, as to whether or not the minors should be made parties defendant. The decree for partition does not find that the minors were parties, nor served with summons. Can a court pass a good title to the real estate in question?

The court can not take title to real estate. It can transfer the title to property of parties before it. Titles to real estate are never suspended. On the decease of an owner the title vests in the devisees or heirs at law.

“A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.” Section 11279, General Code.

“The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. When such determination can not be had without the presence of other parties, the court may order them brought in or dismiss the action without prejudice.” Section 11262, General Code.

This section means that if the necessary parties do not appear in the caption of the petition as having been made parties to the action and served with summons, the court may order them made parties and served. If this is not done it is the duty of the court to dismiss the action.

Counsel for plaintiff relies on the following section of the statute to maintain his contention:

“The guardian of a minor, idiot, imbecile or insane person on behalf of his ward may do and perform any act, matter or

thing respecting the partition of an estate which said ward could do under this chapter if he were of age and of sound mind. On behalf of such ward he may elect to take the estate, when it can be determined without injury, and make payment therefor on his behalf." Section 12044, General Code.

In support of his contention, counsel for plaintiff cites the case of *Foddy v. Miller*, 10 N.P.(N.S.), 76, holding that the filing of an amended answer and cross-petition by the guardian of an imbecile is a legal and sufficient entry of appearance of such imbecile in a partition proceeding.

While I respect the opinion of the court in the *Foddy* case, I am not willing to follow it. I am of the opinion that the section of the statute here referred to does not dispense with the necessity of bringing all the parties to an action before the court. If there was a defect in the service of summons or in the advertisement, and after such incapacitated person was made party and his guardian by proper pleading brought him before the court, it seems to me that that would be sufficient.

In view of the section of the statute requiring the filing of a suit, the issuing and service of summons and the making of the necessary parties to the action, setting out their names in the caption, it seems to me that the provisions of the statute and the decisions of the Supreme Court in Ohio do not warrant the conclusion reached in the *Foddy* case.

An infant can not be deprived of his property, or of his day in court without strict compliance with the statute.

"In an action against an infant, his defense must be by guardian for the suit, who may be appointed by the court in which it is being prosecuted, or by a judge thereof, or by the Probate Court." Section 11252, General Code.

In view of this section of the statute, Section 12044, *supra*, was not intended by the Legislature to authorize parties to an action to sue the guardians and not make the minor a party.

Section 11252 is mandatory. Therefore an action may not be instituted against an infant or other incapacitated person without those persons being made parties to the action. If Section

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12044 is in conflict with Section 11252 then the latter section must prevail, as it is a special act with reference to minors. I do not find, however, that they are in conflict. Section 12044 does not dispense with the making of all necessary parties to an action, it merely provides what may be done after other sections of the statute have been complied with, and the parties are before the court.

This view is announced in the case of *Murr v. Murr*, 17 O. D. (N. P.), 757:

“The appointment of a guardian *ad litem* in a partition proceeding is not a mere form. It is his duty to bring the rights of the ward under consideration of the court for decision, and to investigate the value of the property before one of the parties is permitted to take it at its appraised value.”

Courts are jealous in their care for the rights of minors, and the Supreme Court in passing on this question does not make an exception such as counsel for plaintiff here seeks to have announced in this case.

“The guardian of a minor has no authority to waive the issuing and service of summons upon his ward in an action affecting the ward’s rights, nor to dispense with the appointment of a guardian *ad litem*, unless authorized to do so by statute; a judgment against a minor in an action wherein he did not have his day in court may be reversed upon petition in error filed by him within the statutory time after reaching the age of majority. Such judgment, though void in legal effect, may be a cloud upon his title or rights, and he has the right to remove such cloud by a reversal of the judgment.” *Roberts v. Roberts*, 61 O. S., 96.

The part of this decision to which I desire to call attention is:

“Nor to dispense with the appointment of a guardian *ad litem* unless authorized so to do by statute.”

Section 12044 does not dispense with the necessity of appointing a guardian *ad litem* as is required by Section 11279, General Code. It does not authorize a minor’s rights to be determined without he is made a party to the action. Therefore the conclusion is that Section 12044 authorizes the guardian to do cer-

tain acts after the necessary legal steps have been taken to make the minor a party defendant.

Without all parties before it, the court could not pass title to real estate. In this instance, neither of the minors were made parties defendant, nor served with summons; therefore they were not properly before the court, and the action to compel the purchaser of the property to take same can not be enforced until all the parties interested in the real estate are made parties defendant and are before the court.

While there is nothing in the statute requiring it, I am of the opinion that all parties to an action should be set out in the caption, and where a decree is to affect their rights their names should appear in the caption to the decree. The practice of making "John Smith and others" parties in either a petition or a decree, is bad.

An entry may be drawn accordingly.

ASSESSMENT OF FARM LAND FOR IMPROVEMENT OF THE LINCOLN HIGHWAY.

Common Pleas Court of Wayne County.

HENRY BITNER V. CHARLES FAHR, AUDITOR, W. A. WILSON,
TREASURER, AND THE TRUSTEES OF PLAIN TOWN-
SHIP, WAYNE COUNTY.

Decided, April Term, 1917.

*Improved Roads—Assessments According to Benefits—Laws of Town-
ship Trustees—Injunction Allowed, When.*

1. Under Section 1208 of the General Code of Ohio, as amended May 8, 1913 (103 O. L., pp. 449-456), which requires the township trustees to apportion the amount to be paid by the owners of abutting property, for the improvement of highways therein referred to, according to the benefits accruing to the owner of land so located, it is not sufficient to assess each tract of land according to its frontage when such an assessment would be unjust and inequitable.
2. The trustees are required to exercise their judgment as to the amount of benefits each tract or lot of land receives, and must apportion

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the amount to be assessed accordingly. Where the improved highway was established by the early settlers without regard to direction or section lines and because of its diagonal or irregular course abutting tracts of land are irregular in form and size this rule is imperative.

3. When the trustees refuse, or fail, to exercise their judgment, and levy assessments according to the foot-front of the property, the court will enjoin their collection when grossly excessive, unjust and disproportionate to the benefits received.

Joseph O. Fritz, for plaintiff.

Benton G. Hay. Prosecuting Attorney, contra.

CRITCHFIELD, J.

The plaintiff filed his petition in this court against the county auditor, the county treasurer and the trustees of Plain township, in which he avers that he is the owner of about thirty-two acres of land in said township abutting upon the Lincoln highway; that said Lincoln highway has been improved by paving the same with brick; that under Section 1208 of the 103 Ohio Laws, page 456, the trustees levied an assessment against said tract of land for \$352.20. He avers that this assessment was levied along with assessments against other lots and lands abutting upon said improvement by the trustees in proportion to the foot-front of the several tracts of lands. He further avers that the assessments were grossly unjust, excessive and inequitable and asks for an injunction to restrain the collection of said excessive assessments.

The trustees of Plain township answer and say that said assessments were made in proportion to benefits and are just and equitable and not excessive.

It appears from the testimony on the trial that the trustees gave notice and held meetings as required by the law then in force, and at a meeting held on the 9th day of February, 1916, adopted a resolution in which it was provided that the several lots and lands abutting upon said improvement should be assessed in proportion to benefits and that the foot-front of the several tracts of land should be made the basis for computation. further resolving that benefits were in proportion in their judg-

ment to the foot-front. But it appears from the evidence that in calculating the assessment it was made from the engineer's plat, which gave the lineal frontage of the entire improvement and the lineal frontage of each of the several tracts of land. It appears further that the Lincoln highway was established by the early settlers and the westward migration in the early part of the nineteenth century. It was laid out on the route that appeared the most practicable, perhaps following an Indian trail. Its course was laid with total disregard to direction or section lines and bends and diagonals across the county, as do many other highways in Wayne county.

The tract of land owned by this plaintiff contains about thirty-two acres. It is severed from the south part of the southeast quarter of section three in said township by said highway. It has about twenty-two hundred feet frontage on said highway. It is a long and narrow tract with the longer side abutting upon the highway. It is used for general farming purposes and a place of residence. The plat of the entire improvement was in evidence. A plat showing the size and form of all the abutting properties was in evidence. Testimony of witnesses showed the improvements on the several tracts, and their several market values. Evidence was offered to show how these lands were benefited, from which it appears that the principal benefits conferred were more advantageous market facilities and increased valuation. A part of the lands assessed were farm lands, and it appears that the benefits were fairly equal to all these lands. A part of the property assessed were village lots in the unincorporated village of Jefferson. From the testimony it appears that this assessment is really an assessment by the foot-front; that with respect to the property of this plaintiff it is excessive and unjust in comparison with assessments levied against other lots and lands abutting upon this improvement. It is not sufficient for the trustees to adopt a basis of computation for an assessment of this character such as the foot-frontage of the properties or any other arbitrary rule and adhere strictly to it. The statute requires that they exercise a judgment with reference to the benefits conferred upon each of the several

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tracts of land to be assessed and apportion the assessment in proportion to those benefits. This is especially true where the highway improved is one which is laid out like the Lincoln Highway and most of the highways in Wayne county. It diagonals and curves with the lay of the land in a general east and westward direction. There are many tracts of considerable size with comparative small frontage. There are other small tracts like the plaintiff's with a long frontage, and to impose a large assessment upon the small tract and a small assessment upon the larger tract because of the length of the front is unjust and inequitable and not in accordance with the rule of the statute.

The temporary injunction will therefore be made perpetual against the collection of the excessive portion, which the court finds to be \$150.20.

ACTION BY AN EXECUTRIX ON A NOTE.

Common Pleas Court of Hamilton County.

MARY A. C. SCHILDMAYER, EXECUTRIX, v. CHARLES SCHILDMAYER.

Decided, July, 1917.

Actions—Executrix Sues in Her Representative Capacity—On Indebtedness Evidenced by Note Executed to Her Individually.

An action lies by an executrix in her representative capacity on an indebtedness due the estate of her decedent, notwithstanding the note which now evidences the debt was made payable to the executrix individually when given in exchange for the original note which was payable to the decedent and against which the statute of limitations has run.

H. E. Engelhardt and R. M. Ochiltree, for plaintiff.

J. G. Stewart, contra.

COSGRAVE, J.

Heard on demurrer to amended petition.

Three grounds of demurrer are set forth, but only the second and third have been pressed upon the attention of the court, namely:

(2) That the action herein was not brought within the time limited for the commencement of such action;

(3) That the amended petition does not state facts which show a cause of action.

The amended petition sets forth that the plaintiff is the executrix of the estate of Herman Henry Schildmeyer, who died testate on or about June 6, 1898, leaving to his widow, plaintiff herein, all of his estate during her natural life.

It further alleges that on or about the 26th day of September, 1895, the said Herman H. Schildmeyer loaned to the defendant, Charles Schildmeyer, the sum of \$5,500, and said Charles Schildmeyer executed his note for said sum and delivered the same to the said Herman H. Schildmeyer, promising to pay said sum of \$5,500, with interest at the rate of five per cent. per annum.

It further alleges that said note was unpaid at the time of plaintiff's appointment as executrix.

The amended petition further alleges that the said defendant, Charles Schildmeyer, on November 1, 1903, delivered to the plaintiff his promissory note of that date for the sum of \$5,500, bearing interest at the rate of three per cent. per annum, and further alleges that said note was a renewal of the note of September 26, 1895, executed and delivered by the defendant herein to the decedent, Herman H. Schildmeyer, and represented said original indebtedness of \$5,500. The amended petition contains a copy of said note of November 1, 1903, with all credits of interest paid thereon to November 1, 1914.

It appears that said last mentioned note was made payable to Mrs. M. A. C. Schildmeyer.

The petition further alleges that Mary A. C. Schildmeyer, executrix of the estate of Herman H. Schildmeyer, and Mrs. M. A. C. Schildmeyer, mentioned in said note, are one and the same person.

The defendant having filed this demurrer to the amended petition, admits thereby that he obtained a loan from the decedent, Herman H. Schildmeyer, on September 26, 1895, in the sum of \$5,500, which was unpaid at the death of the said Herman H. Schildmeyer.

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It is also admitted by the demurrer that the defendant made and executed the note set forth in the amended petition and now being sued upon and that he has failed and refused to pay the same upon demand made therefor.

It is likewise admitted by the demurrer that the said note is a renewal of the note given by the defendant to the decedent, Herman H. Schildmeyer, for the sum of \$5,500, as evidence of his indebtedness for such original loan obtained from said decedent.

It appears from the amended petition that while the plaintiff is suing in her representative capacity, as executrix of the decedent, that the note is payable to her individually. It also appears that no time of payment is mentioned in the note.

Both counsel for the plaintiff and counsel for the defendant have submitted lengthy briefs raising various questions of law which it is claimed relate to the merits of the matter in controversy.

In the view the court takes of this case, it is not necessary to review these matters at any length. The defendant admits that he borrowed from the decedent the sum of \$5,500, giving his note as evidence of such indebtedness to decedent, bearing interest at the rate of five per cent; that subsequently, to-wit, eight years after the date of the first note, he gave a new note, of date November 1, 1903, as a renewal of the first note, substituting as the payee of said note the name of Mrs. M. A. C. Schildmeyer instead of the name of the decedent, and also changing the rate of interest from five per cent. to three per cent.

The defendant having admitted his indebtedness on this note, the only question that now remains for the determination of this court is whether or not the plaintiff, as the executrix of the estate of Herman H. Schildmeyer, may recover upon a note given to her individually by a debtor of the estate of her testator.

It is conceded by the demurrer that this money is due the estate of Herman H. Schildmeyer. The representative of that estate is the proper person to make claim on this note, it being an obligation due to her decedent's estate.

On the pleadings, the sum of \$5,500 bearing interest at the rate of three per cent., is due the estate of Herman H. Schild-

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meyer, and under the rule laid down by our Supreme Court in the case of *Phillips v. McConica*, 59 Ohio St., 1:

"An executor is always a proper party to maintain an action to recover money belonging to the estate."

Following this rule the demurrer to the amended petition will be overruled and an entry may be prepared accordingly.

**MEASUREMENT OF THE DISTANCE PUPILS MUST
TRAVEL TO SCHOOL.**

Common Pleas Court of Licking County.

STATE OF OHIO, EX REL JAMES H. STERRET, v. BOARD OF EDUCATION OF WASHINGTON TOWNSHIP, LICKING COUNTY, OHIO.*

Decided, September, 1916.

Schools—Provision of Transportation of Pupils to the Nearest Public School—How the Distance Should be Measured—Section 7731, G. C.
Under the law providing that in all rural and village school districts transportation shall be provided for pupils who live more than two miles from the nearest school house, distance is to be computed by including the distance from the exit of the curtilage by the most direct path or way to the point where it intersects the highway leading to the school house.

J. V. Hilliard and Ralph Priest, for plaintiff.

J. W. Horner, Prosecuting Attorney, contra.

FULTON, J. (orally).

This case is submitted to the court upon an agreed statement of facts. It is an action brought by the plaintiff for a writ of mandamus against the board of education of Washington township, under the following statute:

"In all rural and village school districts, where pupils live more than two miles from the nearest school, the board of education shall provide transportation for such pupils to and from school. The transportation for pupils living less than two

*Error not prosecuted.

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miles from the schoolhouse by the most direct public highway shall be optional with the board of education. When transportation of pupils is provided, the conveyance must pass within one-half mile of the respective residences of all pupils, except when such residences are situated more than one-half mile from the public road. When local boards of education neglect or refuse to provide transportation for pupils, the county board of education shall provide such transportation and the cost thereof shall be charged against the local school district."

The facts as they are admitted in this case are that the plaintiff, Mr. Sterret, lives in a lane which is off of the public road. The distance to his house from the schoolhouse where the children are compelled to go to school is more than two miles, if the distance is measured to the house from the schoolhouse—that is, up the lane—it is more than two miles. If you measure to the opening of the lane where the lane starts off of the public highway, it is less than two miles. If you measure by a straight line from what is called the curtilage, or the yard around the house out to the public highway, on a straight line or by the path, it is more than two miles. If you measure from the house along the path out to the public highway in a direct line it is more than two miles. The question for the court to decide is which of these measurements is to be taken in estimating the distance. The court has the opinion of the Attorney-General here, and the statute is cited in this opinion. From the opinion of the Attorney-General, and from the cases which have been decided, the court thinks that the proper way to measure this is from the curtilage, or yard around the house, in a direct path out to the public highway, which would make it more than two miles.

In the 58 Ohio State at page 390 is a case that was submitted to the court upon this kind of a question, the syllabus being as follows:

"The distance of its residence from the school of its district, which under Section 4022a, Revised Statutes, entitles a child of school age to attend the school of another district, is one and a half miles by the most direct public highway from the school to the nearest part of the curtilage of its residence."

In that case it was contended that the distance should be measured as the crow flies, the nearest way from the schoolhouse, and the court says that that is not the way to measure it. The court says:

“Counsel for the plaintiff in error contend that the distance from residence to school is to be taken ‘as the crow flies.’ The courts below properly rejected this aerial view of the subject. The legislation provides for the convenience of children in attending school, and the distance is to be taken as they travel along the most direct public highway from the schoolhouse to the nearest portion of the curtilage of their residence.”

There is a case also in 11 N.P.(N.S.), 286, *Board of Education of Blue Ash Special School District No. 16, v. Board of Education of Concord Special School District No. 8*, in which the court says:

“In determining the distance pupils of a public school must travel in going from their home to the schoolhouse, the measurement should begin at the exit from the curtilage and run thence along the most direct established route by lane or path to the nearest highway and then follow the center line of the highway to the door of the schoolhouse.”

According to that decision and the other decision, the court thinks that the proper way to measure in this case would be from the curtilage or the yard in a direct line, or the path which is there to the intersection of the path with the public highway, and the distance by measuring in that way is more than two miles; and it is more than two miles if you go up the lane to the curtilage. Either way it is more than two miles. So there may be a writ of mandamus issued against the board of education of Washington township.

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**DEFINITION OF THE WORDS "HEIRS AT LAW" WHERE
PERSONALTY IS INVOLVED.**

Court of Common Pleas of Montgomery County.

**CATHERINE WILSON v. DANIEL W. ALLAMAN, AS EXECUTOR OF
THE WILL OF ISAIAH WILSON, DECEASED, ET AL.***

Decided, May 29, 1917.

*Wills—Bequest to Heirs at Law—Must be Construed Under the Law of
Descent and Distribution Where Personality is Involved—Widow
Takes as an Heir, When.*

Under a bequest of one-third of my estate "to the heirs at law of my
deceased brother B W," the widow of said deceased brother shares
as an heir in all personalty, including proceeds of property re-
duced to cash by direction of the testator.

*Powell & Howell and E. H. & W. B. Turner, for plaintiff in
error.*

Carr, Allaman, Retter & Murr, for defendant in error.

MARTIN, J.

In this case the plaintiff asks the court to construe item 7 of
the will of Isaiah Wilson, deceased. An examination of a copy
of the will shows that this will was executed by Isaiah Wilson
January 4th, 1906; that, according to the petition, on January
18, 1912, Isaiah Wilson died, and that the will was probated in
the Probate Court of Montgomery County, Ohio, February 19,
1912; that Elizabeth D. Wilson, the widow of Isaiah Wilson, died
on the 5th day of February, 1915.

Inasmuch as there is nothing in the other items of the will
bearing upon item 7, which the court has been asked to con-
strue, the court will only quote item 7, which reads as follows:

"Should my said wife not survive me, or upon her death, I
authorize and direct my said executor to reduce all my estate

*Affirmed by the Court of Appeals, *Wilson v. Allaman, Excr.*, 27 C.C.
(N.S.), 282.

to cash, and after the payment of costs and expenses, to distribute the same as follows: One-third to my sister, Mary Jane Hamilton, or heir heirs at law; one-third thereof to the heirs at law of my deceased brother, Ephriam Wilson; one-third thereof to the heirs at law of my deceased brother, Bartholomew Wilson."

The question before the court is, what did Isaiah Wilson mean when he used the phrase "one-third thereof to the heirs at law of my deceased brother, Bartholomew Wilson"?

All parties to this action agree that authorizing and directing his executor to reduce all his estate to cash would leave it in the form of personalty, and that the executor would be guided in distributing the same by the law governing personal property.

There is no question but what the law, not only in Ohio, but in all other states, so far as the court has examined the cases, holds that the estate to be distributed in this case should be considered as personal property.

So, then, considering that personal property alone is to be distributed, the question arises for the consideration of the court as to who are the heirs at law, or rather, who were the heirs at law, of Bartholomew Wilson, deceased, at the time when Elizabeth D. Wilson, widow of Isaiah Wilson, died, she having died after the decease of the testator.

Narrowing the question still further, was Catherine Wilson, the plaintiff in this case, an heir at law of Bartholomew Wilson, being his widow, considering the fact that Bartholomew Wilson had children living at the time of the death of testator's widow, to-wit, Jennie Hussey, Edward Wilson, Alice Wilson and Sarah Sprague?

All parties admit that if it had been real estate that was to be divided among the objects of Isaiah Wilson's bounty in item 7, she was not or would not be an heir at law of Bartholomew Wilson, deceased. But since personalty alone is to be distributed in this case, the plaintiff claims she is and was an heir at law, as intended by Isaiah Wilson when this will was drawn, and when Isaiah Wilson's widow died. In the 79 O. S., page 358, in the case of *Barr v. Denny et al*, in part of syllabus 2, we find that James Barr made use of the following language in his will:

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"After the death of my wife I desire that the whole of my property, both real and personal, be sold by my executor, and after expenses are paid to be distributed equally to my legal heirs." In the third syllabus of this case we read as follows:

"In such case the direction to the executor to pay or distribute to the testator's legal heirs, confers a contingent interest which does not vest until the period of distribution, and a direction to distribute equally 'to my legal heirs' is equivalent to a direction to make distribution in accordance with the statutes providing for descent and distribution."

The question decided in this case was when the interest of James Barr's legal heirs vested. It appears that Margaret Maud Barr, daughter of the testator, James Barr, married the defendant, Henry H. Denny, about eleven years after the death of the testator, and that about two months after her marriage and before the death of the wife of the testator, she died, leaving no issue. The court held that since she died before any interest vested, as mentioned in the item of the will in syllabus 2, Denny was not entitled to an eighth interest of the personal property to be distributed.

These facts are not in point as to the case at bar; but the court has cited this case for the reason that the third syllabus gives a definition of who the legal heirs of James Barr were under the circumstances. The item of James Barr's will, found in syllabus 2, is substantially the same as the item 7 in Isaiah Wilson's will, so far as reducing the real and personal property to cash is concerned, and in so far as the use of the word "distributed" is concerned, the only difference being that the distribution was to be made to James Barr's legal heirs or heirs at law, instead of the legal heirs, or heirs at law of James Barr's brother. And, as has already been stated, in the latter part of syllabus 3 the Supreme Court holds as follows:

"And the direction to distribute equally 'to my legal heirs' is equivalent to a direction to make distribution in accordance with the statutes providing for descent and distribution."

In the 11 C.C.(N.S.), page 274, in the case of *Youngblood v. Youngblood*, a case in which personal property as well as real

estate was involved, in the second syllabus, we find the following definition for legal heirs:

“The expression ‘legal heirs,’ as used by the testator, has a well known definite meaning in the law, to-wit: those upon whom the law would cast the estate if the testator had died intestate.”

And on page 279, beginning at the bottom of the page, Judge Donahue, now on our Supreme Bench, gives the following definition of heirs:

“The legal definition of the word *heirs* is, those who take the estate of an intestate under the statutes of descent and distribution; and all persons who do take any portion thereof under this statute, no matter how small it may be, is an heir in the legal contemplation of the word.”

It is true that the facts in neither one of these cases, so far as a widow being an heir is concerned when children survive, is in point. But as the case of *Barr v. Denny* gives a definition of legal heirs when personal property is distributed, the court thinks it is in point when the words “heirs at law” are used likewise in the distribution of personal property as provided in the will of Isaiah Wilson.

Now this is a general definition which Judge Donahue used when personal property as well as real property was involved, and it was a special definition given by Judge Davis, late of our Supreme Court, when personal property alone was involved.

Counsel for defendant have cited the definition given by Judge Shauck in the case of *Smith v. Hunter et al*, 86 O. S., page 116, which is as follows:

“The meaning of the phrase ‘her heirs at law’ which the testator used to indicate his intention has not been changed since he used it for that purpose. It then meant, and it now means, those who by law might be entitled to succeed to the property of which she would die seized as of an estate of inheritance.”

Now it may be said that this definition would require that those who are to be considered as heirs should be those who under our statutes of descent would take real estate in fee simple.

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And this might be considered the common law definition of "heirs at law" or "heirs," if it were not that in this particular case it happened that the person who claimed to be an heir, and whom the Supreme Court found to be an heir, was not a blood relative, but was in fact an adopted child of one of the beneficiaries of the will.

An examination of the facts, as contained on page 106, shows that Smith, the testator, devised the whole of his estate, both real and personal, to trustees for the benefit of his children, two sons and two daughters. The will directed, with respect to the portions of his estate intended for the benefit of his sons, that the trustees should convey the same to them in fee simple upon their attaining majority; with respect to the portions of his estate intended to be for the benefit of his daughters, he directed that upon their arrival at age, their portion should be set apart, but should still be held by the trustees in trust, the rents and profits only to be paid to them during life, with fee simple to the heirs of his daughters.

Now it happened that one of his daughters married one Isaac H. Kiersted, and afterwards adopted Hannah Moore Duthie as her daughter, and it was Hannah Moore Duthie whom the Supreme Court in this case held was the heir of Mrs. Kiersted, and the term in the will which gave her this right was the following language: "with fee simple to the heirs of said daughters," showing that the intention of the testator when he used the term "heirs" meant that it should be those who would take real estate.

So that taking into consideration the character of the property bequeathed or devised in these two cases decided by our Supreme Court, and also taking into consideration the context of the will, that is, the language used, we would have to decide that when personal property alone is concerned, the definition given by Judge Davis in the case of *Barr v. Denny* is the meaning which the testator, Isaih Wilson, intended to give to the word "heirs" or "heirs at law."

Now it is not claimed that the definition which Judge Davis gave, or Judge Donahue gave, of the word "heirs" or "heirs at

law" is the primary meaning of the word "heirs" or "heirs at law," but is the meaning of the words "heirs at law" which is based upon the statute law of the state, and is the meaning of the words "heirs at law" especially when personal property is involved.

In this case personal property alone is involved. The courts which hold that those are heirs at law who would take under the statute of distribution, when personal property alone is involved and there is nothing in the context of the will to show a different intent, would hold that Isaiah Wilson intended and meant by "heirs at law" those persons who would have taken the personal property of Bartholomew Wilson if he had died intestate.

Now it is true that the courts of the different states have taken different views as to how a will should be construed when the term "heirs" or "heirs at law" is used in the distribution of an estate of personalty.

As standing out prominently among those which hold that the word "heirs" or "heirs at law" should not be modified in their primary meaning by the statutes of distribution for the reason that personal property alone is being disposed of, are the decisions in the courts of the state of New York. Counsel for defendant claim that in the same class with the state of New York are the great majority of the states of the Union. However, the court finds that most of the cases cited are cases in which real estate, and real estate and personal property, are involved, and in which the words used in the context of the will indicate very strongly that the testator meant those who were blood relatives taking real estate, and were not cases in which the distribution of personal property alone was involved. The only cases so cited in which personal property alone is concerned, are the cases of *Phillips v. Carpenter*, 79 Ia., page 600; *Gauch v. St. Louis M. L. Ins. Co.*, 88 Ill. Rep., 252, and the case of *Johnson v. Knights of Honor*, 53 Ark. Rep., 260. These cases will be discussed later on in this decision.

The strongest case decided by the court of appeals in New York on the line that the fact that personalty should not modify the meaning of "heirs" by reason of the statutes of distribution

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is found in *Tillman v. Davis*, 95 N. Y. Rep., page 17. In this case Julia A. Gentil willed one-seventh of one-half of certain property which was considered to be personalty, to William N. Davis of Illinois, and in case of his death the same was to go to his heirs. William N. Davis died in 1878, in the state of Illinois, leaving a widow but no children or parents. The question before the court was whether William N. Davis' nearest blood relatives or his widow were the heirs of William N. Davis, as intended and used in the will.

The court held that the widow was not the heir of William N. Davis, although the property involved was personalty, and in determining that she wasn't the heir of her husband, the court of appeals in discussing the meaning of the word "heirs" as intended by the testator, on page 24, gave the following definition:

"The primary meaning in the law of the word 'heirs' is the person related to one by blood, who would take his real estate if he died intestate, and the word embraces no one not thus related. It is not strictly proper to designate persons who succeed to the personal estate of an intestate. The proper primary signification of the words 'next of kin' is those related by blood, who take personal estate of one who dies intestate, and they bear the same relation to personal estate as the word 'heirs' does to real estate. The words 'heirs' and 'next of kin' would not ordinarily be used by any testator to designate persons who were not related to him by blood."

In continuing the discussion, Judge Earl substantially held that no matter what the statutes of descent or distribution in New York were that this definition should not be modified. In other words, he held that the word "heirs" means next of kin, and next of kin means only those related by blood who would take the personalty if Davis had died intestate, regardless of the laws of distribution.

Judge Earl in this case cites from six to eight opinions of the courts of New York, and in all of them the court seems to ignore the statutes of descent and distribution, even when mentioned in the will, and simply held that the word "heirs," when personalty is involved, refers to a class by themselves—separate and

apart—regardless of the statute law of the state, as those who related by blood to the deceased intestate, would take the estate.

In other words, the courts of New York up to and including the decision of Judge Earl in the 95 N. Y. Rep. did not permit the statutes of New York to modify the original common law definition of the word "heirs" or "heirs at law," unless it was modified in some emphatic way by the testator in the context of the will. On page 29, however, Judge Earl begins a discussion of cases which he admits differ from his own holding. Near the top of page 29 we find the following, in discussing a decision by Lord Campbell of the English courts:

"These utterances of learned English judges give me no courage to trace the English cases through all their perplexing mazes in search of the English rule upon the subject we are now considering. Suffice it to say that that rule seems to have been evolved by holding that the word 'heirs,' when applied to the devolution of personal property, means next of kin, and that the words 'next of kin' in such cases means those who would take personal property under the statute of distribution; and thus they are held to embrace the widow. Such a conclusion is at variance, as we have seen, with the reasoning upon which the cases in this state have been decided. In a few cases in this country, in other states, it has been held that the word 'heirs,' when applied to personal property, means those that by the statute of distribution take the personal property in case of intestacy, and hence embraces widows."

So that we find that the different states have apparently lined up upon different sides of the following proposition: When a testator disposing of personal property alone, uses the term "heirs" or "heirs at law" in connection with the distribution of said personal property, does or does not the word "heirs" or "heirs at law" mean those who take under the statutes of descent and distribution, or the statutes of distribution, provided there is nothing in the context of the will outside of the fact that the property to be distributed is personal property, to show the intention of the testator?

Among those which hold that in case the word "heirs" is used in connection with the disposal of personal property alone, that the word "heirs" should be determined by the statutes of dis-

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tribution, is the state of Massachusetts. In the case of *Sweet v. Dutton*, 109 Mass. Rep., page 592, we find the following:

“If, then, the instrument before us were a will, the word ‘heirs’ ought, according to the whole course of the authorities, to be construed as meaning distributees, there being nothing to indicate a different meaning. The instrument, however, is not a will but a transfer of personal property; and no authority has been cited where the word has been used in such an instrument except in its primary signification. The question then arises, whether the extended signification is to be limited to wills. We think not.”

After citing a number of authorities, the court concludes as follows:

“In view of these circumstances, we think it is to be presumed that in this instrument the parties used the word in the same sense in which they would have used it in a will, and the property should go to the distributee.”

In the case of *Kendall v. Gleason*, in 152 Mass. Rep., page 462, at the bottom of the page, we read as follows:

“On the death of Stillman A. Gleason the trust terminated as to his share, which then immediately became payable ‘to his legal heirs.’ The will contemplated a change of the real estate to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words ‘legal heirs’ must, therefore, be construed to mean those who would take personal property under the statute of distributions. One-third of the fund held by the trustees should be paid to the heirs of Stillman A. Gleason, in the proportions of one-third to his widow, Mary E. Gleason, and two-thirds to his minor son, Benjamin W. Gleason, whose share will be held by his guardian, Albert L. Jewell.”

It will be noticed that in this case the testator died leaving not only a widow but a child.

In the case of *White v. Stanfield et al*, 146 Mass. Rep., page 424, we find the following:

“A testator devised a farm, being the only real estate described in his will, to a son, and created several independent

trust funds, one of which was for the benefit of his son, directing the trustees to 'invest the same in such manner as he shall deem safe and judicious,' and to 'pay over the net income' to him 'during his natural life and the principal of said fund on his death to his heirs at law.' Each beneficiary was to receive interest out of the estate, the first payment of which was to be in advance, until his trust fund was formed, and the fund for the benefit of the son was always invested in personal securities. *Held*, that the term *heirs at law* meant next of kin, or persons entitled under the statute of distribution relating to personal estates."

Counsel for defendants claim that there are later decisions in the state of Massachusetts which give a different definition to the words "heirs at law." It is true that they do when these words "heirs at law" are used in connection with real estate, but they do not overrule the decisions in which *personal property alone is involved* and the intention of the testator does not show that he intended that the definition shall mean those who take real estate. For instance, in the case of *Proctor v. Clark*, 154 Mass. Rep., page 48, cited by counsel for defendants, we read as follows:

"The trust fund consisted of both real and personal estate at the time of the testator's death, and is contemplated as including land by the will. This fact, the use of the words 'convey in fee,' and the use of the similar phrase, 'convey the same in fee to his then heirs at law' in the fifth article of the will, which deals only with land, show that 'heirs at law' must be construed to mean those who would be entitled to succeed to real estate in case of intestacy."

This statement from the 154 Mass. Rep., page 48, would apply to Judge Shauck's definition in the 86 O. S. So that the rule in Massachusetts, that when a bequest of personal property alone is made by will to the heirs at law of the testator, or of any one else named in the will, the term "heirs at law" is to include all who would take under the statutes of distribution, including the widow.

But it is contended by counsel for defendants that the state of Massachusetts should not be included because the widow,

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upon the death of her husband, is entitled to real estate in fee simple instead of her dower.

The *important* question involved is not whether a widow takes personal property under the words "heirs at law," but whether those who take under the statutes of distribution, which relate to personal property alone, are to be considered as "heirs at law" when personal property is disposed of by will.

In the state of Pennsylvania we find that the courts hold with Massachusetts, although in that state the widow is only entitled to a dower interest in real estate. In the 84 Pa. St. Rep., page 241, *Eby's Appeal*, the syllabus reads as follows:

"Where a testator directed the sale and conversion of his real estate into cash, to be divided between his daughter Esther and the heirs of his daughters Elizabeth and Mary in equal shares, the husband of Mary, the latter having died without issue, was entitled to her share of the fund so realized as the 'heir' of his wife as to her personal estate."

It will be noticed that in this case the husband or wife of a party other than the deceased testator takes as heirs. In other words, the husband of Mary, in *Eby's Appeal*, would stand in the place of the widow, Catherine Wilson, the widow of Bartholomew Wilson, in the case before the court. On page 245 of this case we read as follows:

"It follows that this matter must be governed by the ordinary rules applicable to the distribution of personal property. Such being the case, unless a contrary intent is indicated by the will, we must construe the word 'heirs,' as found in that will, as equivalent to 'representatives' or 'distributees.' In such case, the husband must be taken to be an 'heir' of his wife as to her personal estate."

In *Compy's Estate*, 136 Pa. St. Rep., page 159, in the opinion of the court we read as follows:

"While there is some room for difference of opinion on the subject, the weight of authority is that the word 'heirs,' when used in a limitation of personal property to the heirs of the first taker, either substitutionally or by way of succession, is under

stood as meaning those entitled under the statutes of distribution in case of intestacy."

In *Leisure's Estate*, 205 Pa. St., page 119, on page 122 of the opinion the court says:

"The question here for determination, is whether the husband is one of the 'legal representatives' of his deceased wife, within the meaning of the term as employed in the will of A. N. Berrier. If the gift had been of personalty, the answer would have been in the affirmative."

In Hawk's Reports, page 393, in the case of *Croom, Exr., v. Herring et al*, we read as follows:

"The word 'heirs' as here used means heirs *quoad* the property, and not 'children,' 'next of kin,' or 'heirs at law.' By it is to be understood those whom the law appoints to succeed beneficially to the property in question. The property being personalty, the court, in the next to the last syllabus, says: 'Therefore, the widow of the testator is entitled under the term—she being by law appointed to succeed to personal property as well as the children, all claiming under the same statute.'"

In Iredell Equity, Vol. 2, page 72, in the third syllabus, we read as follows:

"A testator directs that two negroes be sold, 'and the proceeds equally divided between my legal heirs,' *Held*: that in this case, the words 'heirs' means those entitled to distribution of the personal estate, and therefore includes the widow of the testator, and also the children of a daughter, who had died in the lifetime of the testator."

In Jones' Equity, Vol. 1, page 114, second syllabus, in the case of *Corbitt v. Corbitt*, we read as follows:

"The words 'heirs,' when used generally, in reference to personal property, means those who take by law or under the Statute of Distribution."

In Lawyers' Reports Annotated, Vol. 3, New Series, page 904, in *Case Note*:

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"While there is considerable confusion in the decisions as to the meaning of the word *heirs* when used in an instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, the weight of authority holds that, when the context does not explain the word, it means those who would, under the statutes of distribution, be entitled to the personal estate of the persons of whom they are mentioned as heirs, in the event of death and intestacy."

There have been a number of insurance cases decided in which the widow was held to be included as a beneficiary under the term "heirs" for the reason that since personalty was to be distributed those would be entitled to the fund who would take under the statutes of descent and distribution in the various states. It is true that in some of these cases the by-laws of the company, or even a policy, may contain language which may throw light upon the term "heirs" or "heirs at law," showing that the widow is included. But the law of construction, so far as an insurance certificate or policy is concerned, upon the death of the insured, is the same as the construction of wills.

In the case of *Knights Templars & Masonic Mut. Aid Association v. Greene et al*, 79 Fed. Rep., page 461, Judge Taft gave a very interesting discussion of the construction to be placed on the word "heirs," when used in an insurance policy or certificate, and distinguishes the law as held by the courts in New York from the law as held by the courts of Ohio. Judge Taft in his decision holds, in the first syllabus, as follows:

"Language in a life insurance policy designating the beneficiary must, subject to limitations of the statute or charter as to who may be designated, be regarded as the language of the insured alone, and is to be treated as of a testamentary character, and should receive as nearly as possible the same construction as if used in a will under the same circumstances."

In a majority of the cases in which a court has been called upon to construe the meaning of the word "heirs" in insurance policies, where simply the word "heirs" has been used, without being modified by any other terms such as "widow" and "orphan," the courts have held that the beneficiaries of the fund

included those who would take under the statutes of distribution, and in case the statutes of distribution included the widow, the widow would take as an heir.

There are, however, three exceptions to this rule, one being the case of *Phillips v. Carpenter*, 79 Iowa, page 600; second, the case of *Gauch v. St. Louis K. L. Ins. Co.*, in Vol. 88, Ill. Rep., page 252; third, *Johnson v. Knights of Honor*, 53 Ark. Rep., page 260.

In all three of these cases the courts hold that under the statutes in their states the widow takes her distributive share of the personal property as dower, and, therefore, she could under no circumstances be considered an heir. As one of the reasons why she could not be considered an heir in taking personal property, when children survive, the Iowa case states that she can not be deprived of her distributive share by will.

If the definition of "heirs," when personal property is involved, is those upon whom the law casts the personal estate of the intestate, would the fact that the widow can not be deprived of her distributive share exclude her under that definition? Does the fact that she can not be deprived of her distributive share by will prevent her from taking her share of the personal property under the statutes of distribution? It seems to this court that this is a very illogical and flimsy reason why the widow should not be included as an heir under the statutes of distribution when personal property is involved.

In the case of *Gauch v. St. Louis M. L. Ins. Co.* the court held that the meaning of the word "heir" could not include the widow because under the laws of the state of Illinois her distributive share of the personal estate was considered as dower, in case the insured died leaving children. It is true that in this case the court gave other reasons indicating that to a certain extent at least they followed opinions of the courts of New York. So that the Illinois courts, in this case at least, held that the statutes of distribution did not apply to the term "heirs" when personal property was to be disposed of.

The third case is that of *Johnson v. Knights of Honor*, 53 Ark. Rep., and on page 260 we find the following:

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"But since the enactment of statutes of distribution, it has often been used in gifts and bequests of personal property to designate the donee or legatee. As to its meaning when used in this connection courts are not in harmony, and there is much confusion and conflict in the decisions. No useful purpose can be served by a review of the cases upon the question in this opinion. Suffice it to say, that the weight of authority holds that the word 'heirs,' when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed and the context does not explain it, means those who would, under the statute of distribution, be entitled to the personal estate of the persons of whom they are mentioned as heirs in the event of death and intestacy."

In this case the court held that the widow was not an heir in case there were children surviving, because the statute of distribution gave to the widow her share of the personal property as dower in the state of Arkansas. By this language it is implied that the court would have held the widow was an heir if her distributive share had not been denominated as dower under the statute of that state. In England, before the statutes of Edward II, personal property escheated to the king, and consequently there were no heirs or next of kin to take the same. Since that time the English courts, as well as many of the courts of the United States, have held that when the term "heirs" is used in connection with the distribution of personal property alone, and there is no modifying language used which might apply to the term "heirs," the word "heirs" or "heirs at law" was construed to mean those who took under the statutes of descent and distribution. And among the exceptions to this rule three from Iowa, Illinois and Arkansas are based mainly on the ground that the widow took her share of personal property as dower under the statutes of those states.

The court can not see the reason for that rule as given in those states, when applying to an insurance policy or a will, because the widow takes personal property just as absolutely and completely as the surviving children. A complete answer to the decisions in those three states on this contention will be found in the 11 O. S., page 1, hereinafter cited in this decision.

The common law definition of "heirs" was a definition which was largely created by the courts of England. According to Webster's and the Standard Dictionaries, the origin of the word is uncertain, and neither dictionary attempts to give the original meaning of the word "heres," Latin origin. The Cyclopaedia Britannica, in discussing the word "heirs," traces its origin to the Latin word "heres," and says that it originally meant grasping, or, in the verbal form, "to grasp." The original Greek and Sanscrit gave it the meaning of *hand*.

So that the meaning of blood relation, and those who take real estate seem to have been *injected* into this word by the courts of England, and after the English Parliament, in the time of Charles II, provided for the distribution of personal property whereby the wife was to receive one-third of said personal property absolutely, the courts of England began to *eject* the requirement of blood relation and ability to take real estate out of the word when personal property was involved.

The courts of many of the states of the United States have followed suit, but a considerable number of them still retain the old meaning in spite of the fact that the reasons for said meaning no longer prevail as to personal property.

Now, coming back again to the state of Ohio, I have already given the definition as given by the court in 79 O. S., in which the legal definition of the word "heirs" is, "those who take the estate of an intestate under the statutes of distribution when personal property is involved." But we find that this is not the only decision indicating the trend of the courts in the state of Ohio, unless there should be something in the context of the will outside of the character of the property to determine the definition of the word "heirs" or "heirs at law."

We find that the courts of this state have, from the very beginning, sought to modify the old common law definition of the word "heirs," and in doing this they had recourse to the statutes of descent and distribution. A typical case is that of *Weston v. Weston*, 38 O. S., decided by Judge McIlvaine, in which he attempts to determine the meaning of the word "heirs"; and we find that Judge McIlvaine in determining this meaning, be-

cause there was nothing in the context of the will itself to change the meaning, had recourse not to the old worn-out definition given by the English courts, when it was applied to real estate, and real estate alone descended to others than the king, but to the statute of descent and distribution. And applying the rules, he immediately eliminated the requirement of blood relative, and found that the widow was intended by Washington A. Weston, the testator, to be his heir, although in that case there were no children surviving.

This decision, together with other decisions of the Ohio courts, show that the Ohio courts have created the definition of the word "heirs" out of our statutes of descent and distribution; or, if they have not created the definition, they have so modified the old common law definition as to make it conform to our statutes of descent and distribution, until we have Judge Donahue giving as the legal definition of the word "heirs," "those who take the estate of an intestate under the statutes of descent and distribution."

As has already been stated by the court, Judge Davis gave a definition which, so far as the condition of the estate and the use of the words "distributed" and "heirs at law" are concerned, is exactly in line with the case at bar. That is, that the use of the words "legal heirs" in that case is equivalent to a direction to make distribution in accordance with the statutes providing for descent and distribution.

But, contends the counsel for the defendants in this case, this definition might apply provided the heirs at law were the heirs at law of Isaiah Wilson, instead of the heirs at law of his deceased brother, Bartholomew Wilson. In that case, of course, the widow of Isaiah Wilson would take her distributive share of the personal property regardless of the will, and would have taken her dower in the real estate, unless she chose to elect under the will. Of course, upon that supposition it was necessary to draw a will which would require that Isaiah Wilson's estate should be reduced to cash immediately after his death, and then provided the wife elected to take under the will she would be given her distributive part of the cash in lieu of her dower in

the real estate and her distributive share of the personal estate. If the words "heirs at law" are modified to mean those who take under the statute of distribution when personal property is to be distributed, why should not the words be so modified when the heirs of some one else are designated as taking personal property as well as the heirs of the testator? What is it that changes the meaning of the word from its primary meaning? It is the fact that personal property is to be distributed, and that fact *alone* controlled in the cases cited. The question remains, who are those who would take the personal property of Bartholomew Wilson when the personal property of Bartholomew Wilson is to be distributed? They would be those upon whom the law would cast the personal estate of Bartholomew Wilson, or those who, under the law of descent and distribution, would take the personal estate of Bartholomew Wilson.

In considering who it was intended were the heirs of Bartholomew Wilson, in case he died intestate, with personal property alone involved, we would simply ask the question, who would take personal property of Bartholomew Wilson under the statutes of descent and distribution if he died intestate? There is no question but what under Section 8592 of the General Code, under the chapter of descent and distribution, the widow would take one-half of the first \$400, and one-third of the remainder in case there were children. But it may be said that she would take this personal property as dower, that as a widow, and not as an heir, and that, therefore, the definition given by Judge Davis and Judge Donahue should be modified, and we should say that heirs are those who take under the statutes of descent and distribution, with the exception of the widow.

Now we have a decision in the 11 O. S., in the case of *Conger et al. v. Barker's Administrator*, page 1. In this case the court gives a very interesting review of the various statutes which have been passed upon the rights of the widow to her distributive part of the personal property. It brings the statutes down to the act of 1840, and the statute of distribution as to the widow's share was then substantially the same as it is now. On page 8, beginning at the bottom of page 8 and concluding at the top of page 9, we read the following:

"It thus appears from this cursory view of the legislation of this state upon the subject, that the provisions made for the widow out of the personal estate has differed from that in relation to her dower in the real estate, by always giving her the absolute property instead of a mere life use of the same."

Beginning in the last paragraph on page 10, which is concluded on page 11, we find that the court gives various reasons why the widow's share of the personal property is different from her dower in the real estate; first, that she has an absolute title to all the personal property distributed to her; that she is given the same title to her share of the personal property which is given to the children; that her title is made to accrue upon the death of the husband; that the title of the widow accrues at the same time under the same statute and is of the same character. And in the last sentence of said paragraph on page 11 we read as follows:

"These statutes of distribution seem rather to recognize the relation of the widow to be to the intestate, in nearness and affection, akin to that of the child, and possessing a like claim to be regarded an heir, as to his personal estate, and to take with heirs, as co-distributtee, a certain part of the personal estate."

So that according to this decision the widow's share of personalty is not to be considered as a dower. Section 8592 is incorporated in a chapter under which the widow takes her share of the personal property, known and named as the chapter of descent and distribution, and is not incorporated under the chapter on dower in the General Code.

In the first sentence of said section we read that the widow or widower will be entitled to all the personal property; and the second sentence of said section, in which the intestate leaves children, we read the same language, "the widow or widower will be entitled to one-half of the first \$400," etc. So that the same language giving her the whole of the personal property, when it is admitted she would be an heir, even of the real estate, is used in the second sentence when giving her only a part of said personal property.

One of the main requirements in order to make a person an heir under the common law use of that term was that the person taking real estate should have an absolute title in fee simple to all of the real estate. This requirement is not only met in regard to the widow's rights to the personalty, but it is more than met because the testator can not even deprive her of this right by will unless she so elects.

The court has given a number of Ohio decisions in this case, but the decision most nearly in line as to whether or not a widow is to be included as an heir when personal property alone is involved, when a child is surviving, is decided in the 3 C. C. Rep., page 577, in the case of *Young Men's Mutual Life Insurance Association v. Pollard et al.* In this case the syllabus reads as follows:

"P. became a member of a mutual life association, and received a policy, which on his death entitled his 'heirs' to receive a certain sum from the association. He died, leaving a widow and one child surviving him. *Held*: That his widow and child were his heirs as to said sum, and took it as tenants in common, and in the proportions fixed by the statute of descent and distribution, when the intestate has died, leaving a widow, and a child or children."

According to the facts in this case there was nothing in the by-laws or in the policy of insurance in the way of language, such as "widow" or "orphan," which would modify the meaning of the word "heirs." When the policy was issued he was unmarried, but was the father of a daughter by a former marriage. After he became a member of the association he married again, and not long thereafter died, leaving his widow and child surviving him. This policy was payable to his heirs, and the question under the circumstances was for the court to construe what the word "heirs" meant. It is well to take note here that \$1,000 from the insurance policy was never the property of the insured, although he was the owner of the policy, in view of the observation by defendant's counsel, that the money to be distributed among Bartholomew Wilson's heirs was never Bartholomew Wilson's property. And in determining what the word "heirs"

meant, the court on page 578, near the middle of the page, asks the following question:

“Is Mrs. Pollard a person who would take personal estate from her husband on the distribution of his personal estate, dying intestate?”

After discussing the statutes regulating descent and distribution, the court finds that the statute would give to her from her husband's personal property one half of the first \$400 and one-third of the residue. The court then says:

“The widow by virtue of these statutes takes a certain share of the estate of her husband left for distribution. Can it be said that she does so as an ‘heir’? There can be no doubt but that, if the provision was made in the will, it would be held to apply as well to a widow as to a child.”

In the conclusion the court holds that the widow is entitled to \$400 and the child to \$600. Judge Cox dissented from this decision, because he did not believe that the widow was an heir.

If the court was right in this decision, there is no question but what Catherine Wilson was an heir of Bartholomew Wilson's personal estate, provided he died intestate. And all the decisions of the different states which hold that the word “heirs” used in a will or an insurance policy, when personal property is to be distributed, includes those who would take under the statutes of distribution, together with the findings and the reasoning of the courts of Ohio which this court has cited, sustain the decision made by Judges Smith and Swing in the Third Circuit, as just cited.

The court, therefore, holds that in the will just submitted to the court for construction, Isaiah Wilson, when he used the term “heirs at law” of his deceased brother, Bartholomew Wilson, intended to include and meant to include Catherine Wilson as an heir at law of Bartholomew Wilson, provided she was still living when Elizabeth D. Wilson, Josiah Wilson's widow died.

IMPERFECT LIENS VALIDATED.

Common Pleas Court of Hamilton County.

AGNES PARK V. THE WILLIAMSON HEATER COMPANY ET AL.

Decided, August, 1917.

Mechanic's Liens—Holders of Claims Protected—Where Perfection of Liens Was Prevented by Owner of the Property.

Mechanic's liens will be recognized and ordered paid, where failure of the sub-contractors and material-men to perfect liens was due to duplicity of the owner of the property, who took title thereto under an assumed name and thus prevented her identity from becoming known to those holding claims against her upon which they were entitled to obtain valid liens.

Aaron A. Ferris, for plaintiff.

H. J. Buntin, C. Bates and C. S. Burdsall, contra.

COSGRAVE, J.

The plaintiff on January 27, 1917, filed a petition, and on February 19, 1917, an amended petition after being required so to do by an order of this court to make the petition more definite and certain. The plaintiff seeks the annulment of certain liens upon property described in her petition.

The petition alleges that she, Agnes Park, is and was at all times thereafter stated the owner of the property therein described; that on or about October 10, 1913, the defendant, Max Ledermeier as she is advised, entered into a written contract with one Thomas F. Cassilly, who assumed to act for her but without authority to do so, to construct a dwelling house on the lot described in the petition, the cost of said construction to be \$3,850. A copy of the contract is as follows:

"CINCINNATI, OHIO, Oct. 10, 1913.

"By this article of agreement, Max Ledermeier agrees to build a house for Anna Mey according to plans and specif-

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cations, for the sum of \$3,850 (Thirty-eight Hundred and Fifty Dollars) to be paid as follows:

"\$300 when the cellar is walled in.

"\$600 when the house is ready for roof.

"\$1,175 when the house is plastered.

"\$1,175 when the house is completed.

"600 when one-half brick work is up.

"Anna Mey agrees to pay the above mentioned amount of money in the manner stipulated.

"MAX LEDERMEIER,

"ANNA MEY."

Upon a motion to make definite and certain plaintiff was required by the court to state who "Anna Mey" was. In an amended petition the plaintiff stated that it was her maiden name and was signed to said contract inadvertently and without the knowledge or consent of this plaintiff and she supposes the said name of "Anna Mey" was so signed by one Thomas F. Cassilly, presuming to act for her.

The plaintiff further complains that on the — day of July, 1914, the defendant, Max Ledermeier, surrendered possession of said dwelling house as a completed building in accordance with the terms of said contract and specifications, the said Ledermeier so far as the plaintiff is concerned, acting through the said Cassilly.

The petition further alleges the building was not completed according to the terms of the contract. She then alleges the incompleteness of the building in certain particulars.

Plaintiff alleges that she had no knowledge that the Williamson Heater Company had furnished or intended to furnish said heater to Ledermeier. She further alleges that neither Ledermeier nor the Williamson Heater Company at any time prior to the surrender of the building to the plaintiff, delivered to the plaintiff a copy of an affidavit for lien nor furnished to the plaintiff as the *owner* a sworn statement showing the amount or price for which said heater was to be installed in said premises, as required by an act entitled "An Act to Create a Lien in Favor of Contractors, Sub-contractors," as set forth in 103 Ohio Laws, page 369.

She further alleges that the said Williamson Heater Company by reason of its failure to comply with the provisions and terms of said act, has no valid lien or claim for a lien upon the premises described, and that the filing of said affidavit for lien is a cloud upon the title of said property; that the said heater was installed in said dwelling house more than sixty (60) days prior to the filing of said affidavit for said lien, and by reason thereof said the Williamson Heater Company has no valid lien.

It may be said, however, in passing, that at the conclusion of the trial of the cause no very serious contention was made as to the validity of this lien.

Plaintiff further avers that on or about the 22d of October, 1915, the defendant, Harry Nitzschman and Edward David, under the firm name of Nitzschman & David, filed in the recorder's office of this county, an affidavit asserting a lien upon the said premises in the sum of \$428.75, claimed to be due for furnishing the plumbing installed in said dwelling house, under a contract with said Max Ledermeier as principal contractor. Plaintiff avers that she had no notice until long after said dwelling house had been surrendered by said Max Ledermeier as completed that the said Nitzschman & David had been the sub-contractors under the said Max Ledermeier, that said affidavit for lien was not filed until more than one year after said dwelling house had been surrendered by said Max Ledermeier as completed, and so was filed more than sixty days after the last item of material and labor was furnished by said Nitzschman & David in and about the plumbing that was to have been installed by them in said dwelling.

Plaintiff further avers that neither the said Max Ledermeier nor the said Nitzschman & David at any time prior to the filing of said affidavit for lien, served the *plaintiff as owner* with any notice or sworn statement, as required by law, of their intention to furnish said plumbing or that anything was due or would be due to the said firm for or on account of said plumbing. Plaintiff says by reason of such failure the said Nitzschman & David have no valid lien upon said premises, and their claim is a cloud upon the title of plaintiff in said premises.

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The plaintiff further says that the defendant, Gilbert Kerley, on or about November 17th, 1915, more than one year after said dwelling house had been surrendered to plaintiff as completed by Max Ledermeier, filed an affidavit in the recorder's office asserting a claim for a mechanic's sub-contractor's lien by virtue of a contract claimed to have been made by said Kerley with said Max Ledermeier, for painting done upon said premises, and claims a lien in the sum of \$162. The plaintiff alleges that said affidavit for lien was so filed more than sixty days after the last item of labor was performed and the last item of material was furnished in and about said dwelling on said premises, and said affidavit asserts a lien on said premises in the sum of \$162. Plaintiff alleges that she had no notice that the said Gilbert Kerley was or claimed to be a sub-contractor under Max Ledermeier until more than one year after said dwelling house had been surrendered by the said Max Ledermeier as completed.

Plaintiff further avers that by reason of the failure of said Ledermeier and Kerley to comply with the provisions of the Mechanic's Lien Law, that said Kerley has no valid claim or lien upon the said premises, and that the same is a cloud upon the title of the plaintiff in and about the said premises.

Plaintiff further says that the three liens aforesaid, asserted by said sub-contractors, were wrongfully, improperly and illegally filed, that the filing of said liens has prevented the sale of said premises and has caused and is causing great and serious damage to the plaintiff and is a serious cloud upon the title of the plaintiff in and about said premises.

Plaintiff further avers that the defendant, Max Ledermeier, has failed and neglected to complete his said contract, and that requirements under said contract fully known to said Max Ledermeier, remain to be completed in order to comply with the terms of said contract.

The plaintiff prays that the liens asserted by the defendants, the Williamson Heater Company, Nitzschman & David, and Gilbert Kerley be declared invalid, null and void; that they be ordered to cancel their liens upon the record, and that the

plaintiff's title in the premises may be adjudged clear and free of all such claims; that the said Max Ledermeier may be ordered to finish and complete the unfinished work and materials required of him under said contract and that he be ordered to satisfy and make good any claim that the Williamson Heater Company, Nitzschman & David, or Gilbert Kerley may have against said Max Ledermeier, and for all proper relief.

To this the Williamson Heater Company filed an answer and cross-petition admitting the plaintiff is now and has been the owner of the real estate described in her said amended petition; that the said name "Anna Mey" stands for and is one and the same person as the plaintiff herein "Agnes Park." That it entered into a contract with the said Max Ledermeier for the installation of a heater on said premises, and that the contract price of the same was \$110; that on or about the 4th day of December, 1914, this defendant served a copy of an affidavit for a lien upon the plaintiff.

The answering defendant further says that the last of such labor, work and material was furnished on the 28th day of November, 1914, and that there is due to said defendant corporation the sum of \$110 with interest at the rate of six per cent. from the 4th day of December, 1914.

This answering defendant further says that on December 4th, 1914, it filed an affidavit in the recorder's office and sent a copy of said affidavit by duly registered letter to the plaintiff at her home in Cincinnati, Ohio, which said registered letter the plaintiff refused to receive from the letter carrier duly authorized to deliver the same by the United States Government of America; that subsequently, on the 11th day of December, 1914, the defendant served by one of its duly authorized employees a true copy of this affidavit upon the plaintiff.

Nitzschman & David filed an answer and cross-petition alleging that they had furnished the plumbing on said house under a contract for the same of \$428.75; that the last of said work was not furnished because incapable of completion until the occupancy of said house.

The answering defendants further allege that there was and is no such name in the city directory or otherwise ascertainable

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as "Anna Mey" upon whom to serve a copy of said lien, and these cross-petitioners, not knowing and having no reason to suspect that "Anna Mey" was a fictitious name adopted for unknown purposes, did, after unavailing efforts to ascertain her identity, send by mail nevertheless, a duly sworn copy of said lien with a statement that it had been recorded addressed to her at said premises, but that the same was returned by the post-office authorities as unclaimed and unfound and not in the directory.

They therefore ask for judgment in the sum of \$428.75 with interest, and that their lien be protected.

Gilbert Kerley in an amended answer and cross-petition asserts a lien for \$162 for painting and glazing the dwelling-house erected on the premises of the plaintiff under a contract with Max Ledermeier.

The answering defendant says that the place of abode of the plaintiff or correct name of the owner, Agnes Park, *alias* Anna Mey, was unknown to him and could not with reasonable diligence be ascertained at the time of filing his said affidavit for mechanic's lien, and for that reason no notice could be served upon said owner, in strict compliance with the General Code of Ohio in such case made and provided, and asks that the property be sold and the priorities of this and other liens be determined by the court.

Plaintiff by reply and answer puts in issue the allegations set forth in the defendant's answers and cross-petitions.

The evidence discloses a most unusual state of facts. On October 8, 1913, the plaintiff, "Agnes Park," purchased the lot of land in question, taking title thereto in the name of "Anna Mey." This deed was recorded on the same day in the name of Anna Mey. It appears further that subsequently, namely, on June 15, 1915, the plaintiff obtained another deed for the same property from the same grantor, which deed was not recorded, however, until February 19, 1917, the same day on which she filed her amended petition, having been ordered by the court so to do, and in which she stated that "Anna Mey" and "Agnes Park" were one and the same person.

It appears further that during the building of the house the plaintiff issued a number of checks signed Agnes Park, and payable to Anna Mey and indorsed by Anna Mey to contractors and sub-contractors, not including, however, any of the defendants herein named.

During the progress of the case a question arose as to the true relationship between the plaintiff and one Thomas F. Cassilly, who was a witness in this proceeding, and as to whom certain allegations were made in the petition. The court is of the opinion that it is not necessary to now pass upon this matter; neither is it advisable to do so, largely by reason of the fact that an action is now pending between the plaintiff herein and said Thomas F. Cassilly.

The court has followed and considered with much interest and great care the arguments of learned counsel on the different issues of law and fact presented in the case. The evidence and the arguments present an anomaly of law and of facts, furnishing an apt illustration of the old saying: "What a tangled web we weave when first we practice to deceive." Whether innocently or fraudulently, the plaintiff by herself or with others has covered this case with a blanket of duplicity which tempts the court to leave her where she has placed herself, and to deny her the help which she seeks through a court of equity. However, considering that the plaintiff is a woman of advanced years, and possibly through lack of experience may not have comprehended her rights and obligations in this matter, the court will grant her such relief as may be justified under the circumstances. It must be borne in mind it is equitable relief she seeks. She has sold this property and the purchaser is withholding a portion of the purchase price until she can convey this property free of the liens of the defendants.

It is manifest that the material, labor and skill furnished by these defendants resulted in a largely enhanced value of her property. This is not an action to foreclose these liens, though such relief is sought in the cross-petition of the defendants, but is primarily an action seeking the annulment and cancellation of these liens as a cloud upon the plaintiff's title to this prop-

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erty. He who seeks equity must do equity and must come into court with clean hands. The plaintiff still has in her possession unpaid contract money sufficient to pay the face of these claims; moreover, it was stated in open court, probably not, however, in an evidential manner, that the enhanced value of this property justly requires her to pay these claims in full. As to the enhanced value of the land and the amount of money in the hands of the plaintiff the court expresses no opinion.

The court, after a careful review of all the facts and the law as the court believes it to be, is of the opinion that while the defendants may not have complied with all the provisions of the mechanic's lien law in the manner in which they should have done, nevertheless, their failure to do so was caused by the duplicity of the plaintiff herself. It was her wrongful conduct that brought this trouble upon her and the court will therefore only grant the relief prayed for upon the payment in full by the plaintiff of all these liens with interest to these defendants, and a decree may be entered accordingly.

One of the counsel in the case, purporting to speak for all, though the court does not recall that all the other counsel concurred therein, suggested that the payment of the face of the claims would be satisfactory. The court does not feel that it can well be a party to this arrangement by reason of the above expressed conclusion, but if the parties hereto effect such an arrangement, a decree may be taken according to their understanding with each other.

In reaching a conclusion in this case the court has not been unmindful of divergent decisions of other courts, but this case is to be governed by the peculiar circumstances surrounding it. Any other conclusion would be practically saying to the plaintiff: You are seeking relief by reason of the failure of the defendants to comply with the provisions of the mechanic's lien law notwithstanding the fact that you by your course of conduct made it impossible for them to do so.

The court is compelled to respond you seek equity for yourself; but deny it to the defendants.

The court further responds that you are not in court "with clean hands."

This law was designed to protect the owner of property seeking to improve it, but likewise to protect those who by their material, labor and skill have added to its value.

Section 8323-8, General Code, provides as follows:

"This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial result, intent, and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for and to give jurisdiction to the court to enforce the same."

A more thorough understanding of just what this section means may be had by reference to the early history of what is now known as the mechanic's lien law. It is related that in 1791, Thomas Jefferson, James Madison and others addressed the Legislature of Maryland as follows:

"Your memorialists conceive it would encourage master builders to contract for the erection and furnishing of houses for certain prices agreed upon if a lien was created by law for their just claims on the house erected and on the lot of land on which it stood. In response to this suggestion the General Assembly of Maryland on December 9, 1791, passed an act creating such liens."

No doubt the reason for this suggestion is to be found in the fact that building material being personalty, when attached to the realty became part of the realty, and as there was no common law lien upon realty but only upon personalty, it was evident that those who so attached their personal property to the realty lost all claim to a lien by reason thereof. It is said the civil law recognized the justice of such a lien and made some provision for it.

Equity could afford no relief under the circumstances above referred to, so that those laws were passed to do that which equity could not do. While rights under these laws are purely statutory and will be governed by the statutes themselves, nevertheless it has been said by some writers that it has a nature peculiar to itself of an equitable character and is said to rest

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upon the broad ground of natural equity and commercial necessity, and while it may rest upon an equitable basis, yet without a statute the broad principles of equity would not reach it. It has been said to rest upon a broad basis of justice and right reason, giving to those who have added to the value of the property of others by their material and labor an adequate means of obtaining compensation therefor.

SERVICE ON MANAGING AGENT OF FOREIGN CORPORATION.

Court of Common Pleas of Darke County.

R. J. WALSH V. COMMERCIAL VEHICLE MOTORS COMPANY.

Decided, July 28, 1917.

Summons—Service on Managing Agent of a Foreign Corporation—Invalid When Interest of the Agent is Antagonistic to that of the Corporation.

Service of summons against a foreign corporation on its managing agent, who has a personal interest in such proceeding as plaintiff or otherwise, antagonistic to his duty in the capacity in which he is served with process, is unauthorized and will confer no jurisdiction even though the person served is within the terms of the statute authorizing service.

L. L. Taylor, for plaintiff.

BOWMAN, J.

Heard on motion for judgment.

The plaintiff sues to recover a personal judgment against the defendant.

The defendant is a foreign corporation, and plaintiff is the managing agent thereof in this state.

The sheriff's return of summons shows service upon the defendant by delivery of a copy thereof to its managing agent aforesaid.

The defendant is in default, and the question is whether plaintiff is entitled to a personal judgment against the defendant on such service.

While Section 11290, General Code, authorizes service upon the managing agent of a foreign corporation, it contemplates service upon a wholly disinterested person, and not upon an agent whose relation to the plaintiff or the claim in suit is antagonistic to the interest of the corporation managed by him.

The service to be effective must be notice to a representative of the defendant *adverse* to the plaintiff. It was not intended that the defendant should be compelled to appear and answer, or be subjected to a judgment upon a default upon a service of summons upon his adversary. In other words, it was not intended that the service upon the plaintiff would give the court jurisdiction of the person of the defendant. To sustain such service would inevitably lead to fraud, for there would be great danger of abuse and inducement to such agent to suppress the fact of service and thereby put himself in a position, if plaintiff, to obtain judgment by default against the defendant, who would, perhaps, know nothing of the proceeding until after judgment had been rendered against it.

Here the personal interest of the plaintiff was antagonistic to his duty as such managing agent. While service upon him was in compliance with the letter of the statute, it was in violation of its spirit. The case comes, therefore, within the rule that service of process against a corporation on an officer or agent who has some personal interest in such proceeding, either as plaintiff or otherwise, antagonistic to his duty as such representative, is unauthorized and will confer no jurisdiction, even though the statute expressly provides for service on one in such relation. *The People v. Fricke*, 252 Ill., 414; *Atwood v. Sault Ste. Marie Light Co.*, 148 Mich., 224; *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.), 357; *George v. American Ginning Co.*, 46 S. C., 1; *Whitehouse Mountain Gold Mining Co. v. Powell*, 30 Colo., 397, 399; *Rehm v. The German Insurance & Savings Institution, etc.*, 125 Ind., 135, 137.

Motion overruled.

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Foundry Co. v. Molders' Union.

**INJUNCTION AGAINST VIOLENCE AND INTIMIDATION
BY STRIKERS.**

Common Pleas Court of Cuyahoga County.

**THE TAYLOR & BOGGIS FOUNDRY COMPANY V. INTERNATIONAL
MOLDERS UNION OF NORTH AMERICA ET AL.**

Decided, June 22, 1917.

Strikes—Proper Purpose of Picketing Destroyed by Use of Groups of Pickets—Individuals Amenable for Violence and Intimidation—But the Union as a Class Can Not be Reached by Injunction, on the Ground of Agency, Unless—Encouragement and Ratification of the Use of Violence—Free Speech as Against Property Rights—Use of Scurrilous Printed Matter Subject to Injunction.

1. An excessive number of pickets about a plant in which a strike has been declared is calculated to defeat the avowed purpose of the union to peaceably persuade the men at work to join the strike, and such a purpose is also defeated by the use of a number of automobiles, loaded with strikers, which are used to follow the men at work to their homes at night, deriding them in an abusive and obscene way accompanied with threats. Such practices go beyond the right of a union to picket. In the instant case the court limits the number of pickets to two, with the use of but a single automobile containing not more than two men, other than said two pickets.
2. Injunction lies against individual members of a union who have been shown to have for the purpose of intimidation, interfered with the business of the plaintiff employer and destroyed property rights by participating in or encouraging assaults upon men remaining in its employ, the stoning of their homes, breaking of windows and scattering scurrilous printed matter concerning them; but in the absence of evidence that such conduct was authorized or approved and encouraged by the three thousand officers and members of the union, they can not, in a class suit, be reached as a class by injunction on the theory of agency in the perpetration of past unlawful acts by such individuals.
3. Where an injunction has been issued against such individuals, and, with knowledge thereof, other members of the general class willfully do acts so enjoined, such other members will thereby, in effect, place themselves subject to the injunction and punishment for its violation.

4. An injunction issued in a strike case restraining the distribution of so-called "scab" circulars, and the making of verbal or written threats in the furtherance of a conspiracy to practice intimidation, etc., does not violate the free speech provisions of our Constitution, at least when such order is limited to the prohibition of such acts "for the purpose of intimidation, etc."

Stanley & Horwitz, Frankel & Frankel and H. J. Crawford,
for the Taylor & Boggis Foundry Company.

Baker, Hostetler & Sidlo, contra.

MORGAN, J.

This is an action by the Taylor & Boggis Foundry Company, a corporation, plaintiff, against a long list of individual defendants and five of such individuals as representatives of a class composed of the membership of Locals 27, 218 and 430 of the International Molders Union of North America, and said International Molders Union itself. The locals and international union are incorporated associations. The plaintiff originally attempted to make the associations parties as corporate or quasi-corporate entities; but, on motion made and granted to quash service on such associations, plaintiff amended its petition to state a cause of action against the membership thereof as a class, and the original title of the case is misleading in naming said unions and locals as distinct entities. For the sake of convenience, however, I may refer to the defendant class as the union or unions.

The plaintiff is engaged in the foundry business, and operates two plants in the city of Cleveland several miles apart, known as No. 1 and 2 respectively.

On or about August 21, 1916, it was employing at No. 1 plant about 52 molders and coremakers in the foundry department, and at No. 2 plant about 137 molders and coremakers in the foundry department. Besides such employees, plaintiff had a force of men engaged in other kinds of work at both plants.

The membership of said union is composed only of journey-men molders and coremakers, that is, men who are supposed to have served not less than four years as apprentices.

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On or about August 21, 1916, the said union called a strike at plaintiff's plants, and all the plaintiff's molders and core-makers went out. It was not shown that they all went out as strikers, but at least substantially all stopped work, and a large percentage of them either had been members or did then join the union, some of such going back to work later when the plaintiff started its works.

Said plants had been operating as "open" shops. The plaintiff did not attempt to operate the molding departments of either of its plants between August 30, 1916, and October 18, 1916.

Immediately after the calling of the strike the unions placed pickets at each plant, and a series of negotiations was had between plaintiff's officers and the officers of said unions, continuing until October 18, 1916, when all negotiations were broken off—for what reason is not shown. The plaintiff then started to operate the molding department of its No. 2 plant. The molding department of its No. 1 plant has not been operating since the strike was called.

The strike is being conducted by the unions through the agency of the third vice-president of the National Union, the defendant, Lawrence O'Keefe (who resides in Cincinnati, but has spent nearly all his time in Cleveland since the calling of the strike), a so-called conference board, composed of about thirty delegates from the three locals, and a strike committee, composed of thirty delegates from the three locals. The membership of the strike committee and of the conference board is practically the same. The individual members of the conference board and strike committee most active in the management of the strike for the union have been the defendant Fred L. Baumgartner (who is also financial secretary to each of the three locals), Richard Kennedy (who has been acting as a business agent for the three locals), William Brown, assistant business agent, and John Langley, who has been primarily in charge of the pickets at plaintiff's plant.

The petition sets forth the extent of plaintiff's business, and in short alleges that the defendants and the membership of said

unions have conspired to injure said business, first, by the calling of said strike, and secondly, pursuing and threatening to continue to pursue a course of conduct, set forth more or less in detail, designed to and having the effect of intimidating plaintiff's employees (principally the molders and coremakers), who went back to work October 18, 1916, or who have, as new men, sought employment with plaintiff.

The prayer of the petition is for a permanent injunction against the various practices complained of, running against the individual defendants, and also the whole membership of said local unions, if not the International Union generally.

The only answer filed was by the defendants O'Keefe, Baumgartner and Kennedy, for themselves as individuals and also as representing the class composed of the membership of said unions, and set forth more or less of a short history of the said International Molders Union and the relations that plaintiff has had therewith. It admits the calling of the strike by said unions, and further details facts pleaded in justification for the calling of said strike, and generally denies the facts, with some exceptions, and responsibility for all acts of violence and intimidation.

Plaintiff's reply to said answer is, in substance, a general denial.

At the commencement of the hearing plaintiff gave notice that it would not offer evidence to prove the allegations of its petition as to an unlawful conspiracy on the part of the defendants, or the class, in the calling of said strike, but would rest its case on evidence of acts and threats, showing violence to and intimidation of its employees and agents, resulting in irreparable damage to its business, and proving, as claimed by plaintiff, a common and unlawful design on the part of the defendants actually concerned, as well as the whole class, to injure it in its business.

This announcement, as was agreed by both sides, took out of the case any burden either side might have been under to prove the lawfulness or unlawfulness of the action of said unions in the calling of said strike.

In support of its charge of a conspiracy to injure it by the defendants and the class, plaintiff called over one hundred witnesses, a number being put on the stand again and again, to testify to various threats and acts of violence.

Passing for the moment the question of responsibility of either the individual defendants or the class, it must be admitted that plaintiff's case did tend to show the following occurrences that happened between October 18, 1916, to time of trial.

1. That the automobiles in which plaintiff transported its employee molders and coremakers back and forth to work most of the time since October 18, 1916, were generally followed by automobiles more or less filled with union men, who, after the cars got beyond the range of police guard generally maintained around the plant since October 18, 1916, would call out in a threatening manner to plaintiff's employees and use abusive and obscene language to them, accompanied with many threats.

2. That when the plaintiff's machines would seek to run away from the union machines, taking advantage of congestions of traffic, etc., there would result chases dangerous to the life and limb of those in both cars and to the public generally. The company would have in use something like five or more cars; and there would usually be a similar number of union cars, at least in the afternoon when the men left for home.

3. That a number of collisions between plaintiff's automobiles and the union's machines was shown to have occurred, some of these collisions appeared to have been deliberately caused by the union drivers.

4. In something like a half dozen cases a committee of union men called at the homes of old employees of the plaintiff, and soliciting them to quit work for the plaintiff, and threatening them with violence if they did not quit. That in such cases said employees did not quit and that shortly thereafter so-called scab cards were distributed in the vicinity of the homes of said employees, and shortly after that, in the night time, stones were thrown through the windows of said employee's homes, endangering the members of their families. On November 10 this happened at the home of four or five of the employees located

in widely separated parts of the city. The scab cards or circulars contained the name and address of one or more of said employees, and quoted dictionary definitions of the work scab—"a mean, dirty, scurvy thing; one afflicted with the itch; a person who takes the place of men on strike," and "don't you think these men should be socially ostracised?" or language similar thereto. These scab cards were printed with the authority of the defendant Baumgartner, and distributed by some of the defendants.

5. Aside from the breaking of windows, about twenty separate acts of bodily violence, on different occasions and to different company employees, were testified to by plaintiff's witnesses as having been committed by the defendants or their associates, and in about a dozen of these cases the defendants' testimony admitted the presence of one or more of the defendants. Some of these assaults were of a very serious nature.

6. In twenty-five or thirty cases the plaintiff's testimony showed threats of bodily harm, made by some of the defendants or some of their associates, to different individual employees, followed in some cases by assaults actually made, as previously mentioned.

There was testimony received of several cases of violence that might be said not to have been fully coupled up with one or more of the defendants.

The foregoing, as thus tabulated, were occasions of threats and violence offered to plaintiff's employees as distinguished from its officers and the drivers of its automobiles. There was testimony of threats made to such officers and drivers on a number of occasions.

Put on a percentage basis, plaintiff's proof tended to show that out of seventy-five to one hundred molders and core-makers that plaintiff has had in its employ at No. 2 plant since October 18, something like twenty-five per cent. or more of them have actually been assaulted, or their houses stoned, or violence of some sort offered to them; and in addition a number of other employees, not molders or core-makers, have been assaulted, and threats of violence have been made to a number of others in individual cases, not speaking of the gen-

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eral threatening language used while the company automobiles have been followed by the union machines. It must be remembered that the strike concerns a comparatively few number of men who have continued working for plaintiff—about 100—who have largely been the subject of the violence in question. The percentage of casualty is warlike in its proportions, and some of the assaults were serious in their consequences. One chance in four to get hurt during four months' service is something to be considered.

Many of the cases of violence testified to by the plaintiff were fully corroborated by entirely disinterested witnesses, and there was strong corroboration of the case made by plaintiff in the admitted circumstances.

Such being the case made by the plaintiff's testimony, the defendant called twenty-five or more witnesses, nearly all of whom were the defendants themselves, who generally denied all overt acts. Where the presence of any defendant at the place of an occurrence was admitted, the particular threat or act of violence was, as a rule, denied so far as anything done by the particular defendant or defendants was concerned, except in a few cases of drunkenness on the part of some union men. To be more specific, testimony offered by the defense went so far as to generally deny the calling by union men of abusive or obscene names, even the use of the word scab or the use of any threatening language.

The position of the defendants at all times was that of denying any design to intimidate plaintiff's employees or agents, but claiming merely a purpose to peaceably persuade plaintiff's employees to quit work, and a purpose to spread the propaganda of collective bargaining through union agencies. The purpose claimed by the defense for the practice of union automobiles following the companies machines was, to ascertain the residences of plaintiff's employees, and in that way obtain the opportunity to interview such employees at their homes or on the way to and from work. The court must conclude, however, from the evidence, that the residences of many of plaintiff's old employees must have been known to the union officials before Oc-

tober 18, 1916. Most of them, according to the defendants' testimony, had joined the union at the time of or shortly after calling the strike. Then, when a committee of one or more union men did visit the home of an employee, plaintiff's testimony shows that, coupled up with an attempt to persuade, there were threats of violence if the employee did not quit; and where the persuasion was not successful, scab cards were distributed, and stoning of employees' houses followed in a number of cases. The fact that this stoning took place, largely all on one night, in rather widely separated parts of the city, tends to prevent any inference that it might have been a mere "neighborhood protest" arising from the distribution of the cards. And further, the defendants practically admitted that no record was kept of names and addresses or any real attempt made to follow up any information that they might have obtained through the use of automobiles. It was shown, though, that the company machines did not go directly to and from the homes of employees when taking them back and forth to and from the shop.

The denial on the part of witnesses for the defense that the word scab was used, as testified to by practically all of plaintiff's witnesses, does not, in the opinion of the court, at all comport with the probabilities. Neither can the court believe that there was not threatening and abusive and obscene language used by many of the union men, as testified to by plaintiff's witnesses. Aside from the testimony, the common experience of men is that, even where arguments are peaceably started with good intentions, if an accord is not quickly arrived at, strong language nearly always results, and generally on the part of that side which is forcing or inviting the argument. The most complete denials on the part of the defendants' witnesses in these regards, though somewhat minor as compared with the question of physical violence, tends to shake the confidence of the court in the frankness of such testimony offered by the defense, to say the least. I fully appreciate there were many occasions where an employee of the plaintiff could only understand a little of the English language, and might have misunderstood the meaning of a union man's words or actions, but in such cases the union

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man concerned knew such facts and it was not likely that he would permit himself to be misunderstood; and every one knows that it is the emphatic, if not polite, words used on such occasions that a foreigner often first becomes acquainted with. At least defendants must assume responsibility for a misunderstanding.

So far as cases of actual violence were concerned the presence at the scene of some of the defendants was admitted in many of the instances, and in many other cases there was strong corroboration of the plaintiff's testimony. A court could not help but get the impression that some of the defendants who did not want, themselves, to indulge in actual violence, passed the word to others who did not have such compunction. A defendant who disclosed to another the fact that a company employee, who was present, was working in a "struck" shop, merely for the purpose of conveying such information, might not be held responsible; but if such information was conveyed for the purpose of inviting the third person to do violence to such employee, then such informant is just as liable for the blow that is struck as the actual assaulter. Good morals would make him the principal offender. When one comes as a witness in the court he is sworn to tell the truth, the whole truth and nothing but the truth. It is my opinion that if this oath had been strictly complied with by some of the defendants who testified, they would, on the witness stand, in answer to many questions asked them, have had to admit a responsibility for doing or encouraging acts of violence and making threats of bodily harm to plaintiff's employees and agents that would, on their testimony alone, fully have established a conspiracy on their part, with others who did or took part in encouraging such acts, to so conduct a strike against the plaintiff as would entitle plaintiff to an injunction against themselves and many of the individual defendants.

This case, like that of an employee injured through the alleged negligence of his employer, requires that the plaintiff make out a case by a preponderance of the evidence. The plaintiff did so in the respects I will point out.

In the court's opinion, it was shown by a clear preponderance of the evidence that the witnesses, Falatko, Kopaz, Zlatni and Vacik were assaulted substantially as testified to by the plaintiff's witnesses; and that the defendant, William Brown, was present and a party to or an aid to each assault.

Likewise the court thinks that the defendant, Fred L. Baumgartner, was at the least an indirect party to the stoning of the houses of various of plaintiff's employees, and the Vacik assault; and that the said defendants, Baumgartner, Brown, Kennedy and Langley have on many occasions, used threatening and abusive language to the company employees that was intended to and did intimidate them, and was the cue and guide for the other union men and sympathizers who did picket duty or rode in the union automobiles.

By the admissions of defendant Langley, it was shown that, so far as the voluntary as well as the paid union pickets were concerned, they would recognize his orders, and the court has not much doubt that any real attempt on the part of said four principal defendants to prevent threats and violence, both around the plaintiff's plant as well as elsewhere, when they were present, would have been most effective to prevent unlawful acts. They, however, seem to have intentionally pursued the policy of encouraging rather than discouraging violence, except during the day time in the immediate vicinity of the plant.

The evidence shows that the following named other defendants also took part in the making of threats, and in the doing of acts of violence, showing an evident knowledge and appreciation of an unlawful design to which they thereby became a party, namely: Joseph Bullock, George Pigeon, Steve Schubert, W. B. Vandelier, and others whom the court will add after checking the full list of defendants and the evidence.

It was also shown that the presence of a great many pickets and the use, as made by the strike managers, of automobiles, interfered seriously with plaintiff's business and served to intimidate the employees. This was an interference with plaintiff's property and the continuance thereof would clearly cause irreparable damage.

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The court up to this point has tried to point out its findings of fact as to those *actually* guilty of taking part in an unlawful conspiracy to do harm to plaintiff's business. Plaintiff contends that the relationship of defendants Baumgartner, Brown, Langley and Kennedy to the whole membership of the unions was such that the court must find all their associates, as well as all the membership of said unions, also parties to such conspiracy.

This is contended for—as I catch the argument of plaintiff's counsel—on two grounds: First, because the union or unions, as a class, called the strike; and it should be inferred, in the light of all the facts, that such action contemplated the use of intimidation, etc., or, if not, that the practice of violence and threats has been ratified by the class. Second, that the principles of the law of agency apply to make the class liable for the acts of all the strike managers appointed to conduct the strike.

As to the first of these claims, it must be remembered that there is no proof that an express agreement existed between any of the defendants to accomplish an unlawful purpose, or to carry out a lawful purpose by unlawful means. The case made by the plaintiff rests on direct proof of actual violence, threats, etc., and the inferences that may be drawn therefrom indicating a common design. There is a legal presumption that a man's purposes are lawful until the contrary is shown. A like presumption applies to an association of men. And this same presumption must be permitted as to the purpose of the calling of the strike by the unions. A strike can be carried on in a lawful manner, and there is nothing in this record that warrants the court in finding that the class as a whole had any common design but for a lawful purpose. It does not appear that the membership of the class, *three thousand or more*, as a body, by the calling of the strike, thereby sanctioned a course of conduct towards the employees of plaintiff that would put them in fear of their lives when they went to work each day and make the members of their families part with them in the morning with much the same feeling as if they were going into battle. There is much in the case that indicates those of the defendants who accomplished or encouraged intimidation did so "to get results," and

to get the credit therefor, and did not want to ask or to be asked questions.

The defendant O'Keefe and the members of the union strike committee and conference board who are not shown to have actually taken part in or encouraged violence or the making of threats, it would seem, would or should have known of what was actually being done in the way of violence and the making of threats, but there is no tangible proof thereof. How would they have learned? Can the court assume that those who actually committed acts, largely criminal in their nature, would have truthfully reported the facts to their superiors or associates, much less the class at large, particularly in the face of the various criminal proceedings pending against some of them during most of the time in question, as shown by the proof? If some reports were made, how can the court assume that they differed from what the defendants concern have testified to in open court under oath? It is not shown just who of the members attended the various meetings of the strike committee or the conference board. The testimony does show that at the various meetings of the various locals held during the progress of the strike, at various times, reports or addresses were made by defendants Baumgartner and Kennedy of how the strike was proceeding; but these reports are not shown to have actually informed as to the violence practiced, and it is shown that only five to ten per cent. of the actual membership of the locals were commonly in attendance at such meetings. If it had been shown that those members of the class not actually concerned in violence had generally, as a body been informed, and had expressly or impliedly asquiesced in acts of the strike managers, then they might well be held as co-conspirators, but such is not the case made.

Do the ordinary rules of agency apply to make the class liable? The class is called a voluntary association, but is that entirely true? It seems to me that many labor organizations or unions are not entirely free-will affairs. Men must work to live, and to live men trained in one trade must, practically speaking, work at that trade. Employers in many lines are in agreement with the labor organizations; and to get employment at his trade a worker must join the union, even where there are some shops

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that are "open" and some "closed" in the same line of business. All workers can not find a place in the "open" shops. I am not saying that the spread of the union idea is a bad thing. I believe it is the better way. But it seems to me that the economic pressure that often exists should be admitted by all, and some degree of social pressure must also be recognized.

A religious organization or a political party is clearly a voluntary organization, and yet I know of no accepted doctrine that makes the membership of such organizations liable for the torts of its agents not committed within the line of their express or implied authority. *DeVoss et al v. Gray et al*, 22 O. S., 159, 169; *Rianhard et al v. Hovey et al*, 13 Ohio, 300, 304.

A corporation organized for profit is based on contract, purely voluntary; the scope of its business is expressly agreed to as a rule; and the agent of such a corporation might well be held, as in the case of *Electric Company v. Black*, 95 O. S., 42, to bind the corporate property to answer for his tortious acts done within the scope of his authority; but the stockholders are not bound personally. If the class as a whole are liable to be enjoined because of the acts of a few, they would also be liable jointly and severally to pay damages. To hold the class liable it would have to be under some rule of law that constructively made them liable without notice, or constructively charged them with notice. I know of no such rule that applies. Certainly, however, if the class as such, either expressly or impliedly, authorized or acquiesced in the acts complained of, then they would be co-conspirators and liable; but such a finding must be based on evidence, and by no fair inference can such fact be said to have been sustained in this case by a preponderance of the evidence.

In support of my conclusion of law in this regard, I cite *Martineau v. Poley*, 113 N. E., 1038 (Mass.); *Glass Mfg. Co. v. Glass Bottle Blowers Association*, 59 N. J. Eq., 49; *Mitchell v. Hitchman Coal & Coke Co.*, 214 Fed., 658-713; *Hill v. Eagle Glass & Mfg. Co.*, 219 Fed., 719.

In the case of *Lawler v. Loewe*, 235 U. S., 534 (and the same case below, 209 Fed., 721), as I understand it, the court found the union membership liable, not on any theory of construc-

tive representation, but because of knowledge and acquiescence found to have existed as a fact.

I believe an injunction should issue against Lawrence O'Keefe, Fred L. Baumgartner, William Brown, John Langley and Richard Kennedy, and all the members of the strike committee and conference board and their successors in office (by whatever name called), and associates active in the actual management of the strike, restraining them against the excessive use of automobiles and the excessive picketing of plaintiff's plant. It evidently was understood by this part of the actual defendants and such of the class that the strike would be or was being conducted by such means, and they must be held liable for the abuse of the right to use these instruments that all contemplated would be or knew were being used.

As to the defendants Fred L. Baumgartner, Richard Kennedy, John Langley, William Brown and the other defendants who appear to have been party to the plan, more or less defined, of furthering the strike by intimidating the plaintiff's employees, I think an injunction should issue, restraining them from all such acts. The court will check the list of defendants with counsel for both sides, so as to not include in the latter class those who may not fall within such designation. But it must be realized that those of the preceding class, or any members of the unions, who practice acts of violence and intimidation after the issuance of the order against such acts, and with knowledge thereof, will thereby in effect place themselves in the class so enjoined against such practices, and be subject to punishment for contempt. See cases cited 22 Cyc., 1012, notes 2 and 3.

I want now to pass to just what the decree should cover. Certainly an order against proposed acts of violence and intimidation can issue, even though such acts may be criminal in their nature.

See *Labat on Master & Servant*, Section 2715, p. 8397, and cases there cited; 22 Cyc., 903, note 37 and cases.

Any hesitancy the court might have in covering such acts by an injunction would be based on policy rather than lack of authority. And as to the particular defendants mentioned who

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have clearly gone beyond their rights in encouraging or doing violence, there is no good reason why the court should not grant such relief as the law provides to protect the plaintiff in its property rights.

The only professed purpose the defendants have had in picketing the plaintiff's plant and in the use of automobiles has been to peaceably persuade, and to obtain information for such purpose. The court can easily realize that there is a legitimate field of competition between union labor and the unionized shops, and non-union men and the "open" shops, particularly if the cost of production is greater in the union shops because of higher pay, etc.; but such competition is not a game to be played without rules, any more than is competition in other lines.

More than two men as pickets on the public streets in the vicinity of plaintiff's shops will not be permitted; and the use of automobiles by the union for the purpose of following plaintiff's employees to and from their work will be limited to one machine with not more than two men therein, other than said two pickets.

As to the threats and the distribution of so-called scab circulars, I believe that the weight of mere precedent is in favor of the power of a court of equity to enjoin such when done in the furtherance of an unlawful conspiracy against property rights. Having this opinion, I have taken not a little time to try and establish in my own mind whether such line of precedent can be held not to violate the constitutional provisions guaranteeing free speech and a free press.

The union labor cause, it seems to me, is one for the spreading of a propaganda rather than for the conduct of what might be called a business. It is very analogous in its principal aspects with the abolitionist movement that took place before the Civil War, when the South looked upon that cause as an unlawful conspiracy both against government as well as against the business and property interests of the South, and the passage of laws to prohibit the circulation of abolition literature was most seriously discussed.

By Section 11 of Article I of the present Ohio Constitution, it is provided:

"Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right." • • •

In the Constitution of 1802 of this state, Section 6, Article VIII, reads:

"Every citizen has an indisputable right to speak, write or print, upon any subject, as he thinks proper, being liable for the abuse of that liberty."

It is obvious a man can not be called upon to respond for the abuse of a privilege until after an abuse has been committed. The question raised, therefore, is, how can a court, in the face of what might be said to be such a plain provision permitting a citizen to say or print anything, issue an order restraining in advance what shall be said or printed and published. If this right is absolutely unqualified, then this court is without power to issue an injunction that would operate to prohibit the doing of such acts, and the following illustrative cases seem to so hold: *Clothing Co. v. Watson*, 168 Mo., 133; *Lindsay v. Montana Federation of Labor*, 96 P., 127, 131.

The case of *Clothing Co. v. Watson* is the leading case against the issuance of an injunction in a case as at bar, but even in that jurisdiction the case is limited by the case of *Door Co. v. Fuelle*, 215 Mo., 421, 472.

But there are other provisions of our Constitution that should be looked at. Section 1 of Article I reads as follows:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and liberty."

By Section 16 of Article I it is provided:

"All the courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay."

Section 20 of Article I also says:

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"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated, remain with the people."

It is not at all certain that the last clause of Section 20 so qualifies the first clause as to make the whole section merely a qualification of the powers granted to the state government. Is it not just as logical to say that in the adoption of the Constitution the rights declared to the citizen should be qualified, if necessary, to protect other rights also declared, as in Section 1, or possibly even not mentioned? Certainly it is difficult to logically contend that the rights of life, liberty and property secured by Section 1 and the right to appeal to the courts for the protection thereof including a court of equity as in case at bar, as provided by Section 16, are any lesser rights than that of the right of free speech. Yet in the case of mere reputation endangered by the publication of libels or slander, it would seem as though the right of free speech is a superior right. 22 Cyc., 900, and cases cited.

Is there a similar inferiority of the right of property to the conflicting right of freedom of speech and the press? The weight of authority shows that where speech or printed matter is published more in the nature of acts than as expressions of sentiments and such acts are part of a design or conspiracy to injure property rights, then an injunction may issue. See the following cases where the right to an injunction is recognized in cases such as at bar to protect a business against verbal threats or printed publications designed to further a conspiracy to boycott or intimidate. *Gompers v. Bucks Stove & Range Co.*, 221 U. S., 418, 439; *M. Steinert & Sons Co. v. Tagen*, 32 L. R. A. (N. S.), 1013 (Mass.), and cases in note.

To protect rights under union labels: *Union v. Lindner*, 2 N. P., 114 (3 O. D., 244); *Martin on Labor Unions*, Section 374.

To protect against blacklisting of working men: *Cornellier v. Huverhill Shoe Mfg. Assn.*, 221 Mass., 554, 560.

To protect against exposure of trade secrets and inducing breach of contracts: *Vulcan Detinning Co. v. American Can Co.*,

12 L. R. A. (N. S.), 102 (N. J. Eq.); *Kinney v. Scarborough Co.*, 40 L. R. A. (N. S.), 473 (Ga.); *Tube Co. v. Tube Co.*, 3 C.C. (N.S.), 459 (affirmed, no rep., 69 O. S., 560).

To protect trade-marks and against unfair trade: *Medicine Co. v. Glessner*, 68 O. S., 337.

It is true that in some of such cases the question of the constitutional provisions covering free speech and press were not raised, and it must be recognized that a mere incidental injury to property is not sufficient to warrant the granting of an injunction. *Willis v. O'Connell*, 231 Fed., 1002.

Is there reason in fact, historical or inherent, for this distinction, for some distinction between the right to be protected in one's reputation and the right to have protection for one's property? Certainly if there is, a nisi prius court should follow the weight of accepted precedent.

These constitutional expressions in question were originally formulated at the beginning of government in this country under written constitutions; and probably, as is admitted generally by those contending for the most unfettered right of free speech, the law as it stood at such time in many respects, unjustly, as most of us now think, emphasized the protection of property more than what might be called personal rights.

Again, it is an obvious fact of history that the acceptance of the principles of free speech and a free press was based on political, rather than social or economic ideas. It was at this early time, as it is now, almost impossible to draw a line where the free discussion of a man's character or reputation should end, and still continue the principle that a democratic government must have as one of its supports the right of any citizen to freely discuss, without previous censorship, the acts, reputation or character of all those who take part in that government, which, at least theoretically, means all persons.

This reason does not apply to verbal or written acts designed to effect an injury to one's property, though it must be admitted in many cases the utterance of slander or libel of a man's reputation is more injurious to him than injury to his prop-

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erty would be, and may at the same time injure his property rights as well. And yet such acts, though affecting one's reputation, can not destroy character, which is fixed by nature or is the result of a person's own molding. It might be argued that the truth, in most cases, will usually be known to a person's associates, or will eventually become known to cure in many cases the effect of false reports; while in the case of property lost or destroyed it can not be replaced; and where damages are incapable of legal measurement, or where the slanderer is irresponsible, the damage to property would be irreparable. *Emach v. Kane et al*, 34 Fed., 46. Where threats and libels are substantially limited to their effect and purposes to damage to property, as distinguished from personal reputation, the issuance of an injunction against the making thereof can, to such extent at least, be distinguished from the case where an injunction is refused for the protection of mere reputation.

The constitutional provisions in question must be accepted in the light of what the people adopting those constitutions must have considered the language thereof to men at the time in which such provisions were formulated. *State v. Wing*, 60 O. S., 407, 420.

The best definition contemporary with the original formulation of such constitutional principles that the court has been able to find is in the case of *People v. Croswell*, 3 Johnson's Cases, 337, where the newspaper libeling of President Jefferson was concerned. Chancellor Kent, in his opinion, adopts the definition made by Alexander Hamilton in his argument of the case, and uses the following language:

"Liberty of the press consists in the right to publish with impunity, truth with good motives and for justifiable ends, whether it respects government, magistracy or individuals."

It is seen that this definition does not concede the right to threaten, slander or libel, except for justifiable ends.

However, I am satisfied that an injunction can issue in this case that will not violate the provisions of the Constitution in

question, and yet prohibit the unlawful acts in question, namely, an injunction prohibiting the defendants Baumgartner, Kennedy, Brown and Langley, and such others who may be shown to have used threats, violence or other means of intimidation, from continuing to make threats or distribute scab circulars "for the purpose of intimidating or encouraging the doing of violence in furtherance of the unlawful purposes," etc. Any violation of such order would make the defendant subject thereto guilty of contempt of court on proof of the guilty purpose or intent coupled up with the fact, and relieve from liability where an act is shown to have been within his constitutional rights.

A somewhat similar order was issued in the case of *Swift & Co. v. U. S.*, 196 U. S., 375, 393, 401.

Counsel may prepare a decree in conformity herewith.

NATURE OF TITLE CONVEYED BY A BEQUEST.

Common Pleas Court of Licking County.

O. A. BROOKS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF
MARIE A. BUTLER, v. NELLIE M. ILER, WILLIAM D.
BEAUMONT AND SAMUEL BEAUMONT.

Decided, April Term, 1917.

Wills—Bequest of Entire Estate Held to Have been a Bequest of a Fee Simple Title.

A bequest "to my legally adopted daughter" of "all my property, real, personal and mixed, the same to be hers in fee simple," is a bequest of a fee simple title to all said property, and not of a mere life estate, notwithstanding a different provision is made of said estate in a subsequent item of the will, to become effective in the event of the death of said daughter occurring before that of the testator or in case of failure on her part to claim said estate.

Stasel & Cornell, on behalf of plaintiff.

J. W. Horner, on behalf of defendants.

FULTON, J.

This is an action brought to construe the will of Marie A. Butler, which reads as follows:

"In the name of the Benevolent Father of all, Amen: I, Marie A. Butler, of the village of Alexandria, county of Licking and state of Ohio, being of lawful age, and being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and making null and void all other last wills and testament by me made heretofore:

"First: My will is that all my just debts and funeral expenses shall be paid out of my estate, as soon after my decease as shall be found convenient.

"Second: I give, devise and bequeath to my legally adopted daughter, Nellie M. Iler (nee Butler), all my property, real, personal and mixed, the same to be hers in fee simple.

"Item 3. In case of the decease of the said Nellie M. Iler before my decease, or if my said property is unclaimed by the said Nellie M. Iler within one year from my decease, then all of my said property is to be equally divided, share and share alike, between my two nephews, William D. Beaumont and Samuel Beaumont.

"Item 4. If any of my said estate remains in the possession of the said Nellie M. Iler at her decease, then the said remainder is to be divided according to the provisions in Item 3 of this my last will and testament.

"Item 5. I hereby nominate and appoint O. A. Brooks, of Alexandria, Ohio, to be the executor of this my last will and testament."

The court holds that Nellie M. Iler takes a fee simple in all the property that was willed to her, in the second item of said will, upon the authority of the case of *Hull v. Chisholm* and the *Sun Lumber Co. v. Chisholm*, decided by the Court of Appeals of Knox County on April 14, 1917, in which the court say:

"The same question is involved in these two actions. They were argued together and will be disposed of together.

"The actions are brought to recover possession of specific real estate, the title to which is determined by a construction of the will of Sarah Hutchinson. Sarah Hutchinson died on October 23, 1895, leaving a last will and testament which was duly probated. The will reads as follows:

" 'In the name of the Benevolent Father of all: I, Sarah Hutchinson, of the city of Mount Vernon, Ohio, do make and publish this day my last will and testament, viz:

" 'Item 1st. I will that my just debts and funeral expenses be first duly paid, and if I have not erected a monument for my late husband and myself I direct that such monument be erected at a cost of not to exceed the sum of two hundred and fifty dollars.

" 'Item 2d. I will and bequeath to Alice V. Hutchinson of the city of Mount Vernon all the property of which I may die seized or possessed both real and personal, to her and her heirs and assigns forever, subject to payment of the debts, expenses and cost of monument mentioned in Item 1 above.

" 'Item 3d. I will and direct that in case of the death of the said Alice V. Hutchinson without leaving any child or children that whatever may remain of the property willed to her in the second item of this will shall be equally divided between my nephews, George B. Stahl of Mount Vernon, Ohio, and Oscar S. Blaney of Marshalltown, Iowa, and in case of the death of the said Oscar S. before the said Alice V. Hutchinson then the share of said Oscar S. in said residue shall go to the said George B. Stahl.

" 'In witness whereof I have hereunto set my hand and seal this 22d day of July, A. D. 1882.

" 'SARAH HUTCHINSON.

" 'Signed, sealed and acknowledged by the said Sarah Hutchinson as her last will and testament in our presence and signed by us in her presence and in the presence of each other and at her request.

" 'WM. MCCLELLAND.

" 'W. C. CULBERTSON.' "

"Alice V. Hutchinson was the daughter of a servant of Mr. and Mrs. Hutchinson and lived with them from the time of her birth. She took the name of Hutchinson and was never known by any other name until her marriage. After the death of Sarah Hutchinson, Alice V. Hutchinson was in possession of the real estate in question until the 6th day of June, 1904, when she sold and conveyed the property to one Banner Allen, from

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whom the title passed through other parties to the defendants in these actions. Alice V. Hutchinson had no child or children, and died on the 15th day of April, 1915, without leaving any property of any kind or nature.

"It is the contention of the plaintiff that Alice V. Hutchinson took only a life estate in the property that remained after the payment of the debts and funeral expenses of Sarah Hutchinson and the erection of the monument provided for by the will.

"The defendants contend that Alice V. Hutchinson took a title in fee simple and that the devise of what remained of the property at the death of Alice V. Hutchinson, to the nephews of Sarah Hutchinson is void.

"The case has been skillfully argued both orally and by brief. The questions involved are so manifestly controlled by judicial decisions in this state that we think it unnecessary to discuss the cases and the opinions cited in an opinion in this case.

"We hold that Alice V. Hutchinson took a title in fee simple and that the defendants hold the property by a valid title, upon the authority of *Widow's Home v. Lippardt*, 70 O. S., 261; *Tracy et al v. Blee et al*, 22 C.C.(N.S.), 33, and *Steuer v. Steuer*, 8 C.C.(N.S.), 71. We also call attention to the statement of the law as found in 40 Cyc., 1587.

"The judgment of the court of common pleas in each case will be reversed; and, inasmuch as the title to the property depends upon the construction of the will, and a remanding of the case for new trial could result in nothing other than a decree in favor of the defendants, this court will proceed to enter the decree that should have been entered by the common pleas court, dismissing the petition of the plaintiff in each case, at his cost, and quieting the title of the defendants in the property in question."

It is, therefore, the holding of the court that Nellie M. Iler takes a fee simple in all the property mentioned and described in item two of the will of Marie A. Butler.

**SUMMONS ON NON-RESIDENT DEFENDANT IN ACTION
FOR ALIMONY.**

Common Pleas Court of Hamilton County.

MADGE MAY STEWART v. WOODFORD T. STEWART.

Decided, October Term, 1917.

*Divorce and Alimony—Service of Summons Must be by Publication—
Where the Action is for Alimony and the Defendant a Non-Resident
—Section 11984.*

Where the defendant in an action for alimony is a non-resident, service of summons must be by publication, and a motion lies to set the service aside where the return shows that it was personal and not by publication. (*cf. 9 Opinions, 63 O. S. & Decisions, 437, 438*)

*Harmon, Colston, Goldsmith & Hoadly, for defendant.
Black, Swing & Black, contra.*

HOFFMAN (CHARLES W.), J.

In this case a petition for alimony has been filed, alleging grounds for alimony and praying that a decree may be granted and that the property set forth in the petition be appropriated to the payment of such amount as may be allowed plaintiff for the maintenance and support of herself and children. An injunction has been issued, restraining the defendant from disposing of his property. The defendant was served with summons personally outside the state in conformity with Section 11297 of the General Code. The procedure thus far in the case is sanctioned by the Supreme Court in the case of *Benner v. Benner*, 63 O. S., 220, with the exception of the service of summons.

The defendant filed the following motion upon which this cause now comes on for hearing:

“Now comes Woodford Thomas Stewart, being the same person named as defendant in the above entitled cause, and, not entering his appearance herein, appearing for the purposes of this motion only, moves the court to set aside and hold for

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naught the pretended service of summons and copy of petition, attempted to be made on him on July 23, 1917, for the reason that said pretended service of summons and copy of petition was attempted to be made without authority of law."

In this state, and in practically all of the courts of other states, it has been held that actions for divorce or alimony are governed solely by statute or positive enactments. In the case of *DeWitt v. DeWitt*, 67 O. S., 340, Justice Spear in the opinion on page 347 says, after discussing the principles upon which our divorce and alimony code is founded, that:

"It may be fairly claimed from the foregoing that courts in Ohio have no general equity jurisdiction in suits for alimony, but that the jurisdiction is such and such only as is given by the statute."

It is clear from an examination of the authorities that there was no common law action for divorce or for alimony, and that jurisdiction in these cases is derived from the statutes concerning them. It is a general rule that statutes of this character must be strictly construed. We find, however, that in respect to statutes that concern alimony and divorce there is great contrariety of opinion. Bishop in his work on Divorce and Alimony expressly refers to this anomaly in construction and interpretation. Whatever may be the weight of authority as to whether they should be liberally or strictly construed, it is clear that no decree for alimony or divorce can be granted except as prescribed by statute, and that service of summons and kindred matters in these cases must be in accordance with the provisions of the divorce code.

Section 11984 of the General Code providing for service by publication and notice when the defendant's residence is unknown is as follows:

"If the defendant is not a resident of this state or his residence is unknown, notice of the pendency of the action must be given by publication as in other cases. Unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff, and could not with reasonable dili-

gence be ascertained, a summons and copy of the petition, forthwith on the filing of it, shall be deposited in the post office, directed to the defendant at his place of residence."

It is apparent that in the case at bar the defendant has not been served according to the provisions of this section; and, it is contended that this section should be ignored inasmuch as the defendant has been served personally in Mississippi as provided in Section 11297, and that it is sought by a provisional remedy to appropriate property for the payment for any decree of alimony that may be allowed, in accordance with paragraph 7 of Section 11292 of the Code.

Section 11984 provides that in actions for alimony or divorce, if the defendant is a non-resident, pendency of the action must be given publication as in other cases. This general provision in respect to publication as in other cases is qualified and limited by the next clause in this section, which provides:

"Unless it be made to appear to the court, by affidavit or otherwise, that his residence is unknown to the plaintiff, and could not with reasonable diligence be ascertained, a summons and copy of the petition, forthwith on the filing of it, shall be deposited in the post office, directed to the defendant at his place of residence."

The court has no jurisdiction to grant a decree for alimony if the provisions of the statute as to the service of summons and publication are not followed.

The case at bar is an action for alimony with an additional prayer for the appropriating of property for the payment thereof. It is an action *in rem*, and the Supreme Court in the case of *Benner v. Benner*, 63 O. S., 220, has held that it comes within the provisions of paragraph 7 of Section 11292 of the Code. This section authorized service by publication in the various cases mentioned therein. In the above mentioned case, viz., *Benner v. Benner*, publication was made under Section 11984, and the court in that case did not suggest that publication could be made under any section of the code other than 11984. To have done so would have created an inconsistency that practically would

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have rendered the statutes concerning alimony a nullity and created a new cause of action not authorized by statute. Whatever may have been the motive of the Legislature, it clearly enacted that before a decree for alimony is granted a copy of the summons and petition must be mailed to defendant if it appears his residence is known. Other inconsistencies, too, would arise, among which is the time when publication is completed and the case may be heard. Section 11292 provides that "service may be made by publication in any of the following cases," etc. It is the opinion of the court that if the case is an action for alimony, then the publication must be under Section 11984; the consistency of the statutes providing for actions for alimony with other sections of the General Code will thus be maintained.

In the case of *Stover v. Stover*, 13 N.P.(N.S.), 550, which is a case for divorce wherein the defendant was served personally out of the state, the syllabus is as follows:

"The statutory provisions for service of summons in actions for divorce should be strictly construed and followed, which requires that where the defendant is a non-resident of the state notice must be given by publication, and not by personal service."

That the case at bar differs from the *Stover* case in that the former is for alimony only, and the fact that a provisional remedy is invoked, is not material. The method of notifying a defendant in a divorce or alimony case is the same and the plain provisions of the statute can not be ignored. The motion of the defendant is granted and an entry may be presented accordingly.

RIGHT OF POLICE OFFICERS TO STOP PUBLIC MEETINGS.

Common Pleas Court of Stark County.

T. H. ROBERTSON ET AL V. CITY OF CANTON ET AL.

Decided, September 19, 1917.

Free Speech—Constitutional Guaranty of—Not Violated by Police Officers in Preventing a Public Meeting Likely to Result in Disorder—Courts Without Authority to Interfere With the Discretion of Municipal Officers in Their Efforts to Keep the Peace.

1. Municipal authorities are charged with the duty of maintaining peace and order in the municipality, and if in their discretion they are of opinion that statements made in public places are seditious or treasonable, or of such a nature as to cause disorder and disturbance of the peace, it is their duty to interfere and, if necessary, to put an end to such meeting.
2. A court can not control public officers in the exercise of their discretion to preserve the public peace and order of the municipality.
3. The Congress of the United States having declared war, and the country being in a state of war, a court will not grant an injunction interfering in any manner with officers of the civil law acting in their discretion to prevent public disorder.

Allen Cook, for plaintiff.

Clarence A. Fisher, contra.

PONTIUS, J.

Plaintiffs upon behalf of themselves and others, all members of the Canton local of the Socialist party, filed a petition in this court against the city of Canton, Charles A. Stolberg, as mayor of the city of Canton, Jesse A. Starrett, as director of public service of the city of Canton, Rufus J. Kunkel, as director of public safety of the city of Canton, and Charles N. Riblet, as chief of police of the city of Canton, alleging in substance that a contract had been made by plaintiffs with the city of Canton for the use of the city auditorium for tonight, September 19, 1917; that Dr. Scott Nearing, of Toledo, Ohio, has been engaged by them

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to lecture there this evening, and that plaintiffs have expended large sums of money in employing said speaker and in advertising such meeting. Plaintiffs also allege that the defendants threaten to and will, unless restrained by this court, stop said lecture and prevent plaintiffs and the Socialist party from conducting said meeting as arranged for, not for the purpose of preventing disturbance or disorder, but "solely for the purpose of preventing and hindering the political activities of the plaintiffs and of the Socialist party and depriving them of their right of peaceable assembly, free speech, dissemination of the theories of Socialism and of other rights and privileges guaranteed by the laws and Constitution of the state of Ohio and of the United States."

Plaintiffs ask that an order be issued restraining defendants and each of them from "stopping, preventing or in any way interfering with the holding of said meeting," and that by order of this court defendants or their agents be compelled to open the doors of said city auditorium for said meeting.

This application amounts to an application for a permanent order, inasmuch as it involves matters to take place this evening.

Plaintiffs claim that a contract was made with the city for the use of the auditorium. It is unnecessary that I determine the right of the plaintiffs to a mandatory order requiring the opening of the auditorium for the meeting, because the officers of the city, the defendants, came before the court, admitted that such contract was made and said that the doors of the auditorium would be opened and the building would be made ready for the meeting, and I shall expect to hold them to their statements here, although I will not issue a mandatory order. Mr. Solicitor, I shall expect you to see that the doors of the auditorium are open unless something arises between now and this evening requiring the closing of the doors.

Plaintiffs ask, however, that a restraining order issue, restraining the defendants, their agents and the police of the city of Canton and any city official from stopping or interfering in any way with said meeting after it is once begun, claiming that these defendants and especially the director of public safety

has threatened to and will, unless enjoined, stop the speaker if certain subjects are discussed, and that this will be done, not for the purpose of preventing disturbance or disorder, but solely for the purpose of preventing and hindering the political activities of plaintiffs and the party they represent, etc.

This application was heard on oral testimony. From that testimony I find that the director of safety did tell plaintiffs and their attorney that, if the subject of the draft law was discussed and criticism of the action of Congress in respect to such law was made, that he would stop the speaker. I also find from this testimony that said safety director threatened to stop the speaker only when in his judgment seditious or treasonable utterances were made or statements were made tending to disturb the peace and good order of the city. There is no proof and I could not find from this testimony that the director of safety, or any of the other city officers, defendants here, threaten to and will, unless enjoined, interfere with the speaking tonight for the purpose only of preventing the political activities of the plaintiffs and of depriving them of their right of peaceable assembly, free speech, etc. Counsel for plaintiffs infers this because of the threats made by the safety director but, as a matter of fact, this inference is not supported by the proof.

Finding these facts as I do, this case is so plain a case that it hardly needs discussion.

It is undoubtedly true, however, that under the Constitution of the United States and of the state of Ohio, the people have the right of peaceable assembly and the right of free speech. Section 11 of Article I of the Constitution of the state of Ohio provides that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right."

Nevertheless, can one make any statements he chooses to make in a speech and compel the authorities of a city, in control of that department of the city government, having the duty resting upon them of keeping peace and good order, to remain silent until such statements are fully completed and then hold the speaker "responsible for the abuse of the right," or may

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these officers of the law, when in their judgment an utterance is made which tends to disturb the peace and order, immediately stop the speaker?

What plaintiffs really object to, as shown by the evidence and argument of counsel, is that the director of public safety and the police officers of the city may act as censors of what they call "free speech."

As defendants here we have the mayor, the director of public service, the director of public safety and the chief of police of our city, all officers of the law the same as this court is an officer of the law. Clearly, among the duties of these defendants is that they maintain peace and order in the city. If they are of the opinion that during the discussion at the auditorium tonight statements are made which the public safety and good order of the city require should be stopped, in my judgment, it is not only their right but their duty to interfere with the speaker and stop him entirely if they deem it necessary. And what I say of them also applies to any one of them.

True, plaintiffs say that in the discretion of these men they should not be censors of the speech to be made tonight, yet they are legal officers, they are the ones in authority in this city clothed with the duty of keeping the public peace of the city and if, in their discretion, they are of the opinion that a discussion of the draft law will cause public disorder, in my judgment, they may end the discussion.

That a court can not control public officers in their discretion in matters of this kind is well settled and needs no citation of authorities, and if I would issue the order asked for I would, in my judgment, be seeking to control them in the exercise of their discretion.

The authorities presented to me by counsel for plaintiffs have been carefully considered, except one or two cases not found in our law library. None of the cases are precedents for this application here. Take the Michigan case cited, 73 Mich., p. 288, and reading from the syllabus, "Under our Constitution and under our government the object and aim is to leave the subject entire master of his own conduct, except in the points wherein

the public good requires some discretion or restraint." That is, a citizen can act and speak as he chooses except where public good requires restraint. Who is to determine when the acts or words of one require restraint for the public good? Surely no other than officers such as the defendants in this case. This court has no more power to restrain them from doing what they think right in order to preserve the peace and order of our city than they, or any one of them, have to tell me how I should decide this or any other case.

I realize that the gentleman who is scheduled to speak tonight is one of your most learned Socialists and yet, if the public officers of this city are of the opinion that he is saying things that will create disorder and trouble among the people of this community, in my judgment they have the right to interfere and stop him. In my judgment a court of equity, if conditions were only ordinary at this time in this country, would not interfere with the civil authorities in maintaining order in any manner they saw fit. Our Congress has declared war and I am of the opinion, and honestly of that opinion, that any court of equity that would grant an order interfering with the officers of the civil law, restraining them from acting in matters within their discretion for the purpose of preserving peace and order, ought to be removed from office. I even think he ought to be impeached and I am just as sincere in my views as plaintiffs and their counsel are sincere in their advocacy of the right of free speech.

No restraining order will be granted and plaintiffs may have an exception.

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**CLAIM FOR TUITION FOR PUPILS ATTENDING SCHOOL
IN AN ADJOINING DISTRICT.**

Common Pleas Court of Licking County.

BOARD OF EDUCATION OF THORN TOWNSHIP, PERRY COUNTY,
v. BOARD OF EDUCATION OF LICKING TOWNSHIP,
LICKING COUNTY.*

Decided, April Term, 1916.

Schools—Pupils Attend a Nearer School in Another District—Construction of the Statutory Provision for Notice of Claim for Tuition for Such Pupils—Acquiescence of Board of Residence District in Such Attendance—Offer of Transportation.

1. The notice required by Section 7735, which permits children residing more than one mile and a half from the school to which they are assigned to attend a nearer school in another district, is a notice

*Affirmed in the following memorandum opinion by the Court of Appeals:

SHIELDS, J.

In this case a recovery was sought by the plaintiff for an amount claimed to be due from the defendant below for tuition for certain children residing in Licking county, Ohio, attending at said plaintiff's school in Perry county, Ohio.

Without here reciting the respective claims of the plaintiff and defendant below set out in the pleadings, it will be sufficient to state that we have read the same in connection with the evidence embraced in the bill of exceptions herein, and we have also read and examined the opinion of the trial judge in said case, submitted with the papers herein, treating as it does of the several issues raised by said pleadings and argued by counsel, and without attempting to add to or enlarge upon the views therein expressed, and approving the conclusion therein reached as to the liability of the plaintiff in error to the defendant in error for said tuition, we adopt the opinion and judgment of the court of common pleas as the opinion and judgment of this court, and it follows that the judgment of said court of common pleas will be affirmed. Exceptions.

POWELL, J., and HOUCK, J., concur.

from the board of education of the district in which the children are attending to the board of the district in which they reside that a claim will be made for their tuition, the purpose of such notice being to give the debtor broad opportunity to settle the claim before the expense of suit is incurred.

2. Knowledge of the board of the district in which the children reside of the fact that they are attending school in an adjoining district and acquiescence therein is sufficient to satisfy the requirement as to notice.
3. The statutory provision "or transportation of pupils provided" does not constitute a defense against payment of such a bill for tuition, where the furnishing of transportation was discussed and perhaps proffered, but was not actually provided.

Kibler & Kibler and Thomas M. Potter, for plaintiff.

Phil. B. Smythe, contra.

FULTON, J. (orally).

This case is submitted to the court upon the evidence. It was tried to a jury some time ago and the jury failed to agree, and after that counsel waived a jury and submitted the case to the court upon the evidence taken at the trial before the jury, and it is all here in writing.

The petition was filed to recover from the board of education of Licking township, Licking county, Ohio, for the schooling of certain children who belonged to a man named Vanatta, who lived in Licking township. The petition claims these children attended school in Thorn township, Perry county, Ohio, for three different terms, as I understand it, or three different years—'10 and '11, '11 and '12, and '12 and '13. The petition sets out the length of time that they attended each one of these terms and the number of children who went to school at this place. The petition also sets out that the school which they did attend was about a mile and a half from their home, and the school in Licking township was more than a mile and a half from the home where they lived, or the school to which they were assigned. The facts are all admitted, or at least there is no dispute about this man having these children, and living

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at the place where the petition says he lived, and there is no dispute about his sending his children to school in Thorn township, and the length of time that they went to school as set out in the petition. The children went to school in Thorn township and they were schooled there for the time set out in the petition. The only question raised is as to whether or not the board of education of Thorn township have put themselves in such a position that they can demand pay from the board of education of Licking township.

The rate per month is set out in the petition at \$3.07 a piece. The court finds from the testimony that that is reasonable, or that it is even less than the testimony shows that it cost. I think the testimony shows more than that, but of course as the petition does not claim more, that would be the outside amount that they could ask, because that is the amount that they have said that it cost to school these children.

The first objection made to the payment of this bill by the board of education of Licking township is that they had no notice that these children were attending school in Thorn township. They claim that they were not notified; that there was no notice sent to them, or at least they received no notice, and that no particular notice was ever served upon them which would tend to charge the board of education of Licking township for the education of these children in Thorn township.

Now, the section of the statute which governs this matter is Section 7735 and reads as follows:

“When pupils live more than one and one-half miles from the school to which they are assigned in the district where they reside,”—there isn’t any question but what that was the case—“they may attend a nearer school in the same district, or if there be none nearer therein, then the nearest school in another school district, in all grades below the high school.”

Now there was not any nearer school in the same district, and the nearest school according to the testimony was the school in Thorn township, and this school was below the grade of a high school, and so it comes within the provisions of this section.

“In such cases the board of education of the district in which they reside must pay the tuition of such pupils without an agreement to that effect.”

Now, if there wasn't anything more in the statute, there would be no question about it, and that would be the end of it. They must pay it without any agreement. There wasn't any agreement made about the schooling of the children at all. The statute says that they must pay for the schooling of the children although without any agreement so to do. The statute says:

“But a board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside. Nothing herein shall require the consent of the board of education of the district where the pupils reside to such attendance.”

Now this matter all turns upon this one clause in this section:

“But the board of education shall not collect tuition for such attendance until after notice thereof has been given to the board of education of the district where the pupils reside.”

On the trial of the case before the jury the court permitted evidence to be given of all the notices that were given—whether they were given before or after, or when they were given—against the objection of counsel for defendant; and counsel for the defendant seems to express great surprise at the holding of the court in reference to the meaning of this section.

The court held that this section meant that before they could bring a suit to collect this bill, notice must be given the other board, and that without that notice they could not bring the action at all.

Now, there was no question but what notice had been given, just before the suit was brought, that a suit was about to be brought, or would be brought, unless this matter was settled before suit, and other notices are mentioned and described that were given to the board of education of Licking township. A

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representative of the board of education of Licking township in 1911, I think it was, went down to see Mr. Vanatta himself, to find out whether or not he was going to send his children to Thorn township, and stating that he wanted to know, because they were about to make arrangements to hire some one to transport children, and that if these children were to be included in those that were to be transported, they would have to make a little different arrangement than if the children were going to school there, because there would be more children to transport and there would be a further distance to travel, and it would require a different kind of a contract with the party who was to transport the children. Vanatta informed this representative of the board that he intended to send his children to Thorn township to school—to the place where they had gone the year before—and that was about the sum and substance of what took place between the representative of the board of education of Licking township and Mr. Vanatta. This representative did not make any demand upon him and did say to him that he should not send his children there, or that they would not be liable for the bill; he did not tender to him any transportation; he said that they would get transportation if he would send his children there, but it was all depending upon the question of whether he would send his children to Thorn township, or whether he would send them where this board of education was to transport them.

The next year they had another consultation with Vanatta something similar to the one I have just spoken about. Another member of the board was present at that consultation—Mr. Davis was present; and about the same result came from that consultation. This board was again informed that Vanatta intended to send his children to Thorn township. They did not object. They simply said that they wanted to know what he was going to do as they were about to hire a man to haul the children from their homes to some school that they had made arrangements with to provide the children of this district with school services; and they left without making any definite ar-

rangement whatever in regard to what should be done, except that they seemed to acquiesce in what Vanatta said, and that was all there was done at that meeting. Now as to the notice. The court did hold that before this action could be brought they must give this notice. The court has not changed its opinion in regard to that matter, and it has not changed its opinion in regard to what this notice is for.

There is quite an argument in the brief of defendant's counsel as to the object of this notice; but I can not get any other construction out of these words, "but the board of education shall not collect tuition for such attendance until after notice thereof has been given," than that they imply the bill has already been made, and they have a right to have notice before they are sued, before the expense of a lawsuit is incurred, and to settle without a suit if they so desire, and they can not be sued until this notice has been given; and I think that is as far as this section goes; and as far as this section is concerned, the court holds that notice was given—not only a notice before the suit was brought, but a notice was given at least for the terms of '11 and '12 and '12 and '13, before the children went to school at all; but as to the notice that they had for '10 and '11, the court is not so clear as to whether they had any notice of that before the children went there to school or not.

Counsel rely considerably upon Section 7737, which reads:

"When the schools of a district are centralized or transportation of pupils provided, the provisions of the next two preceding sections shall not apply."

One of the next preceding sections is 7735 which I have just read and quoted. So that if the schools of the district had been centralized, there is no question but what Section 7735 would not be invoked and would not apply in this case. But the schools of this district had not been centralized. There is no evidence that anything of that kind had been done. There is evidence that this sub-school district was abandoned during the time, but there is no evidence that the schools were centralized

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in this township. If the schools had been centralized in the township, then Section 7735 could not be invoked.

But there is another provision in this same section: "Or transportation of pupils provided."

That transportation was provided for certain pupils there is no question; but the court finds from the testimony, as it is in the record, that there was no transportation actually provided for the Vanatta children. I think that section means, and I think the proper construction of it is, that it must be actually provided. The language of the section is: "Or transportation of pupils provided." They talked about whether they would provide it, or whether they should provide it, but they seemed to acquiesce in the Vanatta children going over to the other school; and the fact is that they did not provide transportation—they did not pay for or send any hack or conveyance to convey the children to the place where they had provided for their schooling; and the court finds from the evidence in this record that no provision was actually made for the transportation of these children.

These are the only reasons which are given by the board of Licking township—or the principal reasons—as to why this bill should not be paid. There is no question made as to the amount of the bill, and the only defense, or the only reason assigned as to why it should not be paid is those two reasons, and the court finds that Licking township ought to pay the board of Thorn township the amount of this bill. Counsel may prepare the entry and put the amount in the entry, figured according to the petition.

EVIDENCE WARRANTING CONVICTION OF ABORTION.

Common Pleas Court of Franklin County.

STATE OF OHIO V. JAMES L. HOLDEN.

Decided, July 3, 1917.

Criminal Law—Elements Constituting the Crime of Abortion—Corroboration of Accomplices—Proof as to the Negative Fact that the Operation Was Not Necessary to Save the Woman's Life.

The testimony of the two accomplices to an abortion, alleged to have been committed by the defendant, is sufficiently corroborated when there is other evidence to the effect that the woman upon whom the crime was committed visited the office of the defendant, a physician, and forty-eight hours thereafter aborted; that she was young and unmarried and was acting without the knowledge of her parents; that she had made admissions to a physician of her condition; and as to the negative fact, that the operation was not necessary to save her life, that she was in good health as shown by the fact that she had been employed up to the time of the operation and walked to the office of the defendant on that day.

Robert P. Duncan, for plaintiff.

D. C. Badger and *A. A. Porter*, contra.

KINKEAD, J.

Defendant was indicted for abortion, and was convicted before a jury. On motion for new trial the contention is that there was no corroboration on the essentials of the crime.

On trial, the girl who aborted and the young man who was responsible for the trouble testified against defendant. Their testimony was to the effect that they were at the office of defendant twice. The first time they did not have the price; the second time, the girl said that defendant used some instrument, felt like it was cutting something; that he introduced something into the uterus two or three times. It is claimed that defendant stated that the girl would be sick in a couple of days. The young man, the author of the girl's trouble, also testified that

he went with the girl to the office of defendant at the suggestion of the girl, and asked him if he could do anything for her, and he said he could. On the first visit White did not have sufficient money, it is stated, so that he returned a second time, when the abortion is claimed to have been committed.

The girl had a miscarriage within forty-eight hours after visiting the house of defendant.

The evidence against defendant as to the alleged illegal operation is that of the two accomplices and that of a colored maid that the girl and the young man visited the office of defendant, and the miscarriage.

There is evidence that the girl used a catheter, one witness being a doctor of this city, who testified that the girl had been to his office and had stated to him that she had used a catheter. White testified that he procured a catheter at a drug store in Newark, and that he used it on her himself.

At the close of the state's case, motion was made by defendant for directed verdict, for the reason that there was no corroborative evidence of the two accomplices, the girl and White, the author of her trouble. The court was about to sustain the motion, when the state applied for an order re-opening its case in order to offer corroborative evidence. The motion was allowed, and the state offered the testimony of a colored maid of defendant, who testified that she saw Miss Snelling at defendant's house on two occasions in February, 1916. She stated she heard no conversation between Dr. Holden and any one. She does not testify that Miss Snelling went into the office of defendant; stating merely that she saw the girl at the house of Dr. Holden twice.

The pertinent question for the court to decide is whether there is any evidence—direct or circumstantial—tending to corroborate the two accomplices on some of the material facts testified to by them.

The rule is aptly expressed by Houck, J., in Wayne county court of appeals in *Lehr v. State*, unreported, as follows:

"At common law the testimony of an accomplice, although entirely without corroboration, was sufficient to support a verdict

of conviction, but this rule does not now obtain in Ohio, and the law now is that one charged with crime can not legally be convicted upon the uncorroborated testimony of an accomplice. The effect of corroborative evidence is for the jury, but whether there is any evidence, direct or circumstantial, is a question of law."

That is the rule of *State v. Robinson*, 83 O. S., 136. Summers, J., states that—

"It becomes necessary for the trial court not only to instruct the jury not to convict upon the uncorroborated testimony of an accomplice, but also to aid them in determining whether there is corroboration. The effect of the evidence is for the jury, but whether there is *any* evidence, direct or circumstantial, is a question of law. (99 Mass., 413.) It is not necessary that the crime charged be proven independently of the testimony of the accomplice, or that the testimony of the accomplice be corroborated in every particular in order that it may be said to be corroborated, but only that there be circumstantial evidence, or testimony of some witness other than the accomplice, tending to connect the defendant with the crime charged and to prove some of the material facts testified to by the accomplice." See 23 C.C.(N.S.), 455, 460.

It seems to be enough that the evidence in corroboration satisfied the jury that the accomplice testified to the truth. (1 Cyc., 192, citing *Reg v. Boyes*, 1 B. & S., 311, holding it unnecessary to corroborate as to the very act.)

In *People v. Josselyn*, 39 Cal., 393, under a statute, it is held that the testimony of the woman alleged to have aborted by reason of an instrument used by a physician, is not corroborated by evidence of others showing the fact of pregnancy, *that she visited the office of the defendant*, and that there was a miscarriage.

The crime of miscarriage consists of five essential elements: (1) Using an instrument or other means, (2) with intent to procure miscarriage, (3) actual miscarriage, and (4) it not being necessary to preserve life, or (5) not having been advised by two physicians.

Miscarriage must result to constitute the crime. *State v. Springer*, 3 N. P., 120.

The fact that the girl, Della Snelling, visited the house of defendant where he had his office, and that she had a miscarriage shortly thereafter is *some* evidence tending to prove the guilt of defendant. Miscarriage is to be deemed part of the crime, and this fact has been corroborated by other evidence than that of the accomplice herself. And the evidence of the colored maid that Della Snelling was at the house of defendant is also one essential fact. The circumstances of such visit by the girl at the house of defendant, and the miscarriage shortly thereafter, both of which are corroborated by other evidence, and the inferences to be deduced therefrom, constitute corroborative evidence as to these essential facts or elements of the crime.

There must be adequate proof concerning the essential negative element required by statute that such miscarriage was not necessary to preserve the life of the girl.

The rule on this point is found in *Moody v. State*, 17 O. S., 111, where it is held to be incumbent on the state in order to convict, to prove that the act of abortion was not necessary to preserve the life of the girl and mother.

It is held in this case that:

“The negative matter in the statute enters into the description of the offense, and (is) necessarily averred in the indictment.

“In such cases, it is a general rule that some proof must be given to sustain such negative allegations.

“Exceptions to the rule obtain only when the proof is readily at the command of the defendant, and is practically beyond the reach of the state.

“The circumstances attending the procurement of an abortion, tending to prove that it was unnecessary for the purpose of preserving the life of the mother, ordinarily can be shown quite so easily, on the part of the prosecution, as it can be proved by the defendant that it was necessary for that purpose.

“Upon the principles settled in the case of *Cheadle v. State*, 4 Ohio St., 477, and the authorities there cited, we think the charge was erroneous.

“The question was not made, and it is not, therefore, necessary for us to decide whether it devolved upon the state to prove that the abortion was not advised by two physicians to be necessary to preserve the life of the mother.

“It may not, however, be improper to remark that, from the nature of the case, it might be impossible for the state to prove

that such advice was not given; while it could, generally, be easily produced by the defendant, and that therefore the burden of proving this negative matter would not fall within the rule that controls the production of proof as to the other negative clause.

"There is, moreover, an obvious difference in the import of the two negative clauses of the statute. The statute does not declare every procurement of an abortion to be an offense, but does so only when it is not done for the purpose of saving the life of the mother. *The absence of this necessity is, then, so far descriptive of the crime, that the offense can not be established without proof that such necessity did exist.*

"It is the producing an abortion in the absence of such necessity, that, upon the theory of the statute, constitutes the offense. Proof that it was done without this necessity would establish the crime, within the spirit and reason of the statute. * * * It is the absence of the necessity of saving life that is the essential part of the negative clauses, which enters into the statutory description of the offense; and in contemplation of the statute, the advice of two physicians is sufficient of the existence of such necessity.

"Since, then, such advice is only evidence of necessity that forms the essential negative description of the crime in both negative clauses, and as it may usually be readily shown by the accused, and must ordinarily be so difficult, if not impossible, to be shown on the part of the prosecution, *it might well be held, upon reason as well as authority, that it is unnecessary for the state to prove that the producing the abortion was not advised by two physicians further than such negative fact may be implied from the proof that it was not necessary to preserve the life of the mother.*

"Nor would it follow, for reasons already indicated, that, if it be unnecessary for the state to prove the want of the advice mentioned in the second negative clause, it would be equally unnecessary to prove the absence of the necessity to save life."

Under the rule of this case, and by the terms of the statute, it is incumbent on the state to prove that the miscarriage was not necessary to preserve the life of Della Snelling.

The evidence offered by the state on this point is as follows:

Question by the state:

"Q. I will ask you whether Dr. Holden at any time asked you whether or not any physician had advised you that an operation was necessary? A. If it was necessary?

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“Q. To save your life? A. I don’t believe he did.

“Q. I will ask you if Dr. Holden at any time told you that an operation was necessary to preserve your life? A. No, sir.

* * * * *

“Q. Had you been advised by any physician that an operation was necessary to preserve your life? A. No, sir.”

While *Moody v. State*, *supra* (p. 113), holds proof of the negative essential, the opinion contains a dictum, above quoted, and again repeated to draw specific attention to it, that:

“as it may usually be readily shown by the accused, and must ordinarily be difficult, if not impossible, to be shown on the part of the prosecution, it might well be held, upon reason as well as authority, that it is *unnecessary for the state to prove that the producing the abortion was not advised by two physicians further than such negative fact may be implied from the proof that it was not necessary to preserve the life of the mother.*”

Though not an essential part of the decision, the above is worthy of much consideration. Attention is also directed to decisions in other jurisdictions.

In *State v. Aiken*, 109 Iowa, 643, 80 N. W., 1073, an abortion case, it was stated that there was

“nothing to indicate the condition of her health, except that she walked to the office of the defendant two or three times. Surely this does not prove beyond a reasonable doubt that the miscarriage was not necessary to save the life of the mother. And we are of the opinion that it does not make out even a *prima facie* case. * * * Every presumption is in favor of defendant’s innocence; and if the facts shown are capable of explanation on any reasonable hypothesis in favor of innocence, there can be no rightful conviction.”

In *State v. Clements*, 15 Ore., 237, the court said:

“Proof that a physician, in his professional treatment of a woman pregnant with a child had used means, with the intent thereby to destroy the child, and the death of the child was thereby produced, is not evidence that the treatment was not necessary to preserve the life of the mother; * * *. The experience of mankind shows that cases have often arisen in

which such treatment has necessarily been resorted to, and in the absence of other proof, the law, in its benignity, would presume that it was performed in good faith, and for a legitimate purpose."

State v. Wells, 35 Utah, 400, 136 Am. St., 1059, 100 Pac., 681, is an instructive decision in which it was held that the

1. State must prove that the miscarriage was not necessary to save the woman's life. That

2. *It is not enough in a prosecution for abortion that circumstances are proved by the state from which an inference may be deduced to preserve the life of the woman, but they must be inconsistent with every other reasonable conclusion.*

3. *The performance of an abortion on a woman of ordinary good health and normal physical conditions is inconsistent with the conclusion that it was necessary to preserve her life. But in such case the good health and physical conditions may not be presumed.*

4. When circumstantial evidence is relied upon, the circumstances must themselves be proved and not presumed.

5. The *corpus delicti* must be proved beyond a reasonable doubt, by evidence other than the defendant's confession.

6. To establish the crime of abortion, it is not enough for the state to prove that the woman was pregnant, and that the defendant performed an operation on her causing a miscarriage, but it must prove that the miscarriage was not necessary to save her life, and this can not be established by the defendant's confession.

7. In a prosecution for abortion, proof of the defendant's illicit intercourse with the woman, and that she was unmarried, is not sufficient to prove the negative allegation in the indictment that the miscarriage was not necessary to preserve her life.

This court, referring to *Moody v. State*, 17 O. S., 110, and the dictum therein expressed, stated:

"The observation made by the Ohio court, that the circumstances attending the procurement of the abortion tending to prove that it was unnecessary to save the life of the woman, ordinarily can be shown quite as easily on the part of the state as by the defendant, and that rule as to the sufficiency of circum-

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stantial evidence, as stated in *Cyc.*, is strictly enforced where decisive, direct evidence is probably obtainable, but is not produced, is here pertinent and applicable."

The court then refers to the fact that when the woman and the physician for the state were on the stand for the state they

"were not interrogated by it with respect to the health or physical condition of the woman, and the state failed to show by them, or by other evidence, that there was nothing in the condition of the woman to indicate any necessity for a procured miscarriage, it may be assumed that if the witnesses had been examined on such matters, the evidence elicited from them would have been against the state, or that the state overlooked the necessity of proving the negative of the statute, or else treated it as a matter of defense."

Coming now to decide whether the evidence offered proves the negative, it may be conceded that it is not essential that the woman be advised or told that the abortion is necessary to save her life, nor that she be informed that two physicians had advised that the operation was necessary to save life. But the rule of circumstantial inference must rest upon the ordinary human deduction from facts and circumstances. The most natural human thing to do when an abortion is necessary to save life would be to inform the patient of the necessity of the operation, if she was in condition to receive such advice. A physician has no right to perform an operation without consent of the patient.

It is reasonable to infer from the failure of defendant to inform the girl that the operation was necessary to save her life, and from her age and not being married, from the fact that her parents were not aware of her condition, from the fact that she was working up to the time of the operation, that the operation was unnecessary to save her life and that two physicians had not advised that it was necessary; that the abortion was not necessary to save life.

Though the only direct testimony on the two negative facts is that of the girl, who is an accomplice, all of the facts and circumstances tend strongly to corroborate her. It is said that

circumstantial evidence is often the most convincing because it is difficult to fabricate connected links of circumstances to preserve the semblance of truth. When facts and circumstances are inconsistent or irreconcilable with claims fabricated, then it is clear that artifice has been resorted to.

The dictum of *Moody v. State, supra*, has more appealing force in considering the facts and circumstances of this case than does the more stringent rule of the decisions from other jurisdictions referred to herein. While no evidence as to the health and physical condition of Della Snelling was offered, still the natural and reasonable inferences are apparent and clear.

As to the evidence offered in support of the claim that defendant removed a catheter, we think that there is no basis or grounds for the court to interfere with the verdict. The court concurs in the verdict of the jury, which placed no credence in this claim.

The jury may consider physical conditions and possibilities or improbabilities and give the same such weight and effect in comparison with the vocal utterances of any witness, or any number of witnesses. It may consider the fact that witnesses may falsify, while physical situations and conditions may not. *Hong v. Lumber Co.*, 144 Wis., 337, quoted Ohio Instructions to Jury, Section 1732.

The motion for new trial is therefore overruled.

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Baird et al v. Detrick et al.

THREE-FOURTHS VERDICT VALID IN WILL CASES.

Common Pleas Court of Clark County.

MILTON J. BAIRD ET AL V. CAROLINE E. DETRICK ET AL.*

Decided, 1917.

Wills—Contest of—Attorney Who Witnesses Will Competent as a Witness to the Testamentary Capacity of the Testator—Alleged Declarations by a Deceased Witness to a Will as to Incapacity of Testator Not Admissible—Verdict by Three-fourths of Jury Authorized in all Except Criminal Cases.

1. Where one about to make his will consults with an attorney and makes communications to him in that capacity, and after the will is drawn requests the attorney to act as a witness thereto, he will be regarded as having thereby given express consent that the attorney may appear and testify as to the validity of the said instrument, both in the probate thereof and in any subsequent proceeding affecting its validity; and in so testifying he may speak of communications made to him by the said decedent during their relation of attorney and client and having respect to the said will, and to advice given to the testator as a client at the time of the making of the will, where the testimony so offered bears upon the testamentary capacity of the testator.
2. By attaching his name thereto a witness to a will certifies by implication that the testator is of sound mind and in the possession of testamentary capacity, and in a contest of the will the testimony of witnesses who would say, if permitted so to do, that one of the witnesses to the will, now deceased, had stated subsequent to its execution that the will was invalid because of the incapacity of the testator is not admissible.
3. Nor is testimony competent in chief as to alleged declarations by the two beneficiaries named in the will reflecting on the testamentary capacity of the testator, and where such testimony is offered in rebuttal it is not error to limit it to the effect it might have on the credibility of said witnesses.
4. The constitutional amendment providing for a three-fourths verdict, together with the statutory amendments carrying it into effect, is not limited to a technical construction of the words "civil ac-

*Affirmed by the Court of Appeals in an unreported decision, rendered July 3, 1917. Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court October 23, 1917.

tion," but applies to all cases tried in the common pleas, municipal or justices courts which are not criminal cases.

McGrew, Laybourne & McGregor, Stafford & Arthur, W. M. Rockel, O. H. Miller, W. Y. Mahar, for contestors.
Zimmerman & Zimmerman, C. S. Olinger, contra.

GEIGER, J.

Clara J. Mills died on the 4th day of March, 1916, leaving an estate of approximately \$100,000 to her nephew, Edward Cultice, and his wife, Iva Cultice.

The will was dated February 26th, 1915, and the two codicils thereto were dated February 26th, 1915, and December 19th, 1915.

An action was brought to contest the validity of this will and the codicils thereto, and an issue made up which was tried to the jury. The verdict of the jury sustained the will and codicils.

A motion for a new trial is made on the ground that the verdict is not sustained by the evidence, and on account of alleged errors of the court in numerous particulars.

The questions raised are numerous, and it would be impossible to express the court's opinion in detail on each point upon which it is claimed by counsel that the court erred. Those points which seem to be most important will be here considered at some length, while upon other points the court will simply announce his conclusions.

The testimony introduced bore largely upon the alleged mental incapacity of the testatrix, by reason of her extreme age and on account of a serious accident suffered by her just prior to the making of the will.

The will was witnessed by Mr. C. S. Olinger and Dr. R. B. Horse. Mr. Olinger, an attorney at law, was counsel for Mrs. Mills, and as such consulted with her at the time of making the will. After the will was drawn Mrs. Mills requested Mr. Olinger to act as a witness, which he did, and Dr. R. B. House, the physician who attended the testatrix at the time the will was made, and long prior thereto, also signed as a witness.

Upon the trial the contestees offered Mr. Olinger as a witness, and the court permitted him, over the objection of counsel for contestors, to give evidence as to the testamentary capacity of

the testatrix as shown by her acts and conversation at the time he consulted with her as an attorney in reference to the will, the will being executed the same day. The ruling of the court in permitting Mr. Olinger to testify is claimed by counsel for the contestors to have been prejudicial error.

The question is whether Mr. Olinger, being counsel for Mrs. Mills, was prevented by Section 11494, General Code, from being a witness. This section provides:

“The following persons shall not testify in certain respects. (1) An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician concerning a communication made to him by his patient in that relation, or his advice to his patient. But the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject.”

In this case the client being dead, it was impossible for her either to testify voluntarily or to give express consent at the time of the trial, that her counsel might testify.

The purpose of the evidence offered was to throw light upon the question whether the testatrix was, at the time of making her will, of sound mind and memory, and such testimony would unquestionably have been competent had it been given by a person other than the counsel for the testatrix.

It is urged by counsel for contestors that the consent given when the testatrix requested the attorney to act as a witness can only be implied and that this “implied” consent falls short of the “express” consent required by the statute, and by the case of *Ausdenmoore v. Holzback*, 89 O. S., 381, and that to permit the attorney to testify there should have been an express consent given by the testatrix, either in the will itself or in some other manner. Citing *Bowers on Law of Waiver*, Section 192, and cases cited in notes; *McMasters v. Scriven*, 85 Wis., 168; *Herman v. Schlesinger*, 114 Wis., 382.

The question narrows to the point as to whether a request made by the testator that his attorney act as a witness to his will, is an express consent that such attorney shall testify whenever called upon to probate the will, or sustain its validity, or

is only an implied consent falling short of the requirement of the statute.

There appears to be no authoritative case in Ohio upon the question as to whether the disability of the statute is removed when a testator requests the attorney, to whom he has made a communication in that relation, to act as a witness to the will. The same statute, in reference to a physician, is commented upon in the case of *Ausdenmoore v. Holzback*, *supra*.

The court, in speaking of the qualifying language which permits a physician to testify, says:

“This qualifying clause we hold to mean there can not be a waiver except in two ways: First, by an express consent of the patient, or by the patient taking the stand and voluntarily testifying as to the things and matters communicated to his physician, the latter being held to be in effect an express waiver as to that physician.”

The rule above expressed by the court seems to have been broadened where a will is in contest, in the case of *Bahl v. Byal*, 90 O. S., 129, where it is held that it is competent for a physician of the testator to express an opinion as to the condition of the patient's mind, founded on his study and observation of the testator while in professional attendance upon him.

This question, while undecided in Ohio, is not so in other states. In the *Matter of Coleman*, 111 N. Y., 220, the court construes the statute of New York, differing slightly from the Ohio statute. By the New York statute the pledge of secrecy imposed by the statute is to be observed unless its provisions are “expressly waived by the client.” In that case the court was of the opinion that because of the request made by the testatrix that her attorney act as a subscribing witness to the will the provisions of the statute as to secrecy were expressly waived, and that the attorney became a competent witness in all matters in relation to the execution of the will, including the testamentary capacity of the person making the same. To the same effect are: *Thompson on Wills*, Section 127; *Paige on Wills*, Sections 364, 365; *Am. & Eng. Ency. of L.*, Vol. 23, 77; cases cited in *Am. Dig. Cent. Ed.* Vol. 50, columns 993-995; *Jones on Evidence*, Vol. 4, Section 755; *In re Mullins Estate*, 42 Pac. (Cal.), 645; *Speer v. Speer*, 146 Iowa, 6; *Sellars v. Sellars*, 49 Tenn., 430.

It appears to the court that under these authorities there can be no escape from the conclusion that when a person about to make a will consults with an attorney and makes communications to him in that capacity, and after the will is drawn requests that such attorney act as a witness, that such testator thereby expressly consents and agrees that the attorney may appear and testify, both in the probate of the will, and in any proceeding that may affect its validity.

To put the construction upon the act of the testator insisted upon by the contestors would be to nullify the very purpose of the testator in requesting the trusted adviser to act in the capacity of a witness. The purpose of the statute is to protect the confidential communications made by a client to an attorney, and it can scarcely be conceived that the protection thus given to the client should be used to deprive him of the services of the one who is best able to give testimony as to his testamentary capacity after his death.

The court therefore holds that there was no error in permitting Mr. Olinger, though an attorney for the testatrix, to testify as a witness to communications made to him by his client in that relation, and as to his advice to his client at the time of making the will, where such testimony bears upon the testamentary capacity of the client.

Dr. R. B. House, the other witness to the will and the family physician of the testatrix, died before the testatrix, and in the probate of the will his signature was proved by witnesses familiar therewith.

The statute provides that upon the trial of an issue the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of a will.

The contestors sought to introduce evidence tending to prove statements made by Dr. House immediately after he had witnessed the will to the effect that the will was not valid because of the mental incapacity of the testatrix. The court sustained the objection of the contestees to this evidence.

It is claimed by counsel for contestors that inasmuch as it is the law of Ohio that a person who attaches his name to a will as a witness impliedly certifies that the testator is of sound mind and has capacity to form the purpose and intention of disposing

of his property by will (*Stark, Extr., v. Cress et al*, 22 C.C. [N.S.], 88), that such implication may be overcome by showing the declarations of such witness made outside the court, even though such witness to the will has not been called into court.

Very interesting briefs are presented by counsel for both sides and numerous cases are cited, among which is the case of *Runyan v. Price*, 15 O. S., 1, which appears to be but imperfectly indexed and digested on this point. It is admitted by counsel for contestors to be directly in point and to sustain the court in its ruling. In that case one of the subscribing witnesses had died before trial, and his testimony taken at the probate of the will was read in evidence. The contestors then offered in evidence declarations of the witness, respecting the capacity of the alleged testator to make a will at the time the one in question purported to have been made, for the purpose of impeaching his testimony.

It was held that before such statements can be given in evidence to impeach the witness he must be interrogated as to the same; and the fact that an opportunity for such examination has been cut off by the death of the witness does not form an exception to the general rule. The want of such examination goes to the competency of the evidence; and where the witness had no opportunity of explaining the supposed declarations, nor the party to be affected thereby of examining him in reference thereto, this mode of impeachment can not be resorted to.

This is an interesting case, decided as to this proposition by a divided court—Judges White, Brinkerhoff and Scott concurring, and Judges Ranney and Wilder dissenting.

It is urged by counsel for contestors that the matter should be examined *de novo*, in the light of more recent decisions in other states and opinions of text-book writers.

A number of authorities have been cited which seem to support the contention that such evidence may be admitted, as follows: *Wigmore on Evidence*, Volume 2, Section 1033, sub-div. 4; Sections 1505-1514; *14 Ency. of Evidence*, 420; *40 Cyc.*, 1302, and cases cited; *In re Will of Hesdra*, 119 N. Y., 615; *Church v. Ten Eyck*, 25 N. J. L., 40.

The court is not sufficiently impressed with the reasoning of the above authorities to wish to depart from the authority of

Bunyan v. Price. The reasons given in the opinion, and especially the reasons given by Judge Brinkerhoff, appeal strongly to this court. It would be highly dangerous to allow interested witnesses to appear and give testimony as to the declarations of a deceased witness to a will reflecting upon the testamentary capacity of the testatrix.

It is true that the accident of the death of this witness places the contestors at a disadvantage if, as claimed by them, he during his lifetime made the remarks claimed, reflecting upon the testamentary capacity of the testatrix; but it would be more unjust to the contestees should the accident of his death permit a flood of hearsay testimony as to his declarations to contradict the implication that arises from the fact that he signed the will as a witness. As Judge Brinkerhoff says:

“Such declarations are based on the lowest kind of evidence, and the administration of justice will suffer little in any case by their exclusion; while, if admitted, and they are falsely alleged against a dead witness, it would be hardly possible ever to disprove them.”

The court therefore holds there was no error in excluding the testimony of the witness offered by the contestors, as to alleged statements made by Dr. House, the deceased witness, reflecting upon the testamentary capacity of the testatrix.

All the property of the testatrix was given by her will to Edward Cultice and to his wife, Iva Cultice. Upon the trial the contestors sought to introduce testimony of witnesses as to alleged declarations of Mr. and Mrs. Cultice, reflecting upon the testamentary capacity of the testatrix. The court sustained the objection to this evidence on the authority of *Thompson v. Thompson*, 13 O. S., 356, where it is held that on the trial of an issue, in a proceeding under the statute to contest the validity of a will, declarations in reference to mental capacity of the testator, made by a legatee or devisee who is a party defendant to the proceeding, are not admissible in evidence to impeach the will, where there are other legatees or devisees whose interest may be injuriously affected by the introduction of such evidence.

It is claimed by counsel for the contestors that inasmuch as Mr. and Mrs. Cultice were the sole beneficiaries under the will that the rule would not apply.

The court can not see by what theory the rule should be relaxed from the mere fact that certain declarations are alleged to have been made by all of the beneficiaries under the will. They did not make the same declarations, and neither joined in the declarations of the other, and the reasoning of the case cited would certainly not have permitted the declarations of either to be introduced, except as to throwing light upon their credibility.

The court therefore holds there was no error in excluding testimony in chief as to the alleged declarations of Mr. and Mrs. Cultice, reflecting upon the testamentary capacity of the testatrix, and in limiting such testimony when introduced in rebuttal to the effect that it might have upon the credibility of the witness alleged to have made them.

One of the grounds set out in the motion for a new trial is that the court erred in instructing the jury that three-fourths of their number could return a verdict; and, further, that the verdict returned by nine jurors in this case is unauthorized and not a valid verdict.

In support of this contention it is urged that the contest of a will, being a special statutory proceeding, does not fall within the constitutional and statutory amendments permitting a verdict by three-fourths of the jurors.

This contention is not without judicial support. An interesting case, throwing some light upon the question, is that of *Schneider et al v. Reitelbach et al*, 17 N.P.(N.S.), 124, the opinion being announced by Judge Kinkead, of the Common Pleas Court of Franklin County.

In that case it is held that the civil action created by the code, embracing as it does only the common law and equity actions, does not include the statutory remedy of contest of wills, in so far as the latter may be invested with the procedural incidents of the former.

It is held that the proceeding to contest a will is a statutory remedy or action, in which the right of trial by jury exists not by constitutional right, but by statutory sanction. It is pointed out by the judge rendering the opinion that there is a clear distinction between civil actions and extraordinary remedies and statutory proceedings such as the contest of a will. The court says:

"It is indisputable that the civil action was not intended to take the place of statutory remedies of partition, dower, the extraordinary remedies, contest of wills," etc.

The same judge, in the case of *State, ex rel Sonnanstine, v. Bostwick*, 18 N.P.(N.S.), 24, holds that the three-fourths jury rule does not apply to the jury of five electors to whom is submitted the determination of the right of property levied upon under an execution, as provided by Section 11741 *et seq.* of the General Code, relating to the justice's court, for the reason that it is a special statutory proceeding, as distinguished from a civil action. The court says:

"It is not a civil action or civil case such as contemplated by Section 10350 of the justice's code, wherein it is now provided that a three-fourths verdict may be rendered by a jury."

Following the same line of reasoning is the case of *N. & W. Ry. Co. v. Foster et al*, 19 N.P.(N.S.), 267, in which it is held that a proceeding for the appropriation of property is a special proceeding, and not a civil action within the meaning of Section 11455, General Code, as amended, providing for the return of a verdict upon the concurrence of three-fourths of the jury therein.

The court arrives at the conclusion that the appropriation of property is not a civil action, but is a special statutory proceeding, and that therefore the three-fourths jury rule does not apply.

In the case of *Slemmons et al v. Toland*, 25 C.C.(N.S.), 485, it is decided that Article I, Section 5 of the Constitution, and Section 11455, General Code, include actions to contest the validity of a will, and a verdict in such actions may be rendered upon the concurrence of three-fourths or more of the members of the jury. This authority fully supports the instruction given in this case, that a verdict could be rendered by three-fourths of the jurors.

The court holds that the contest of the validity of a will is a civil action and that the trial proceeds under the civil code. In this respect the opinion of the court differs from that announced in *Schneider v. Reitelbach, supra*.

This court, however, is disposed to base its decision on broader grounds than those announced in *Slemmons et al v. Toland*.

Section 5, Article I of the Constitution as amended in 1912, provides that the right of trial by jury shall be inviolate, except that in civil cases laws may be passed to authorize the rendering of a verdict upon the concurrence of not less than three-fourths of the jury. This amendment went into effect on the first of January, 1913. It was not self-executing, and required legislative action before it could become effective. *Elder v. Shoffstall*, 90 O. S., 265.

In February, 1913, the Legislature amended Sections 11455, 1579-19 and 10350, 103 Ohio Laws, pages 11, 12 and 13, providing for a three-fourths verdict in the courts of common pleas, municipal courts and justices' courts.

Section 11455 provides in all civil actions the jury shall render a verdict upon the concurrence of three-fourths or more of their number. The statute uses the words, "civil actions," whereas the constitutional provision uses the words "civil cases."

Civil actions and civil cases are used synonymously in the constitutional provision and in the amendatory statutes, and are clearly not used in the technical sense as distinguishing a civil action from a special statutory proceeding.

A study of the proceedings and debates of the Constitutional Convention of 1912, pages 129-131, 141, 142, 168-172, 175-198, in reference to this amendment, clearly discloses that the members of the convention considered that the amendment should apply to all cases other than criminal proceedings. Several amendments were introduced and voted down which omitted the words "civil cases," which now appear in the Constitution, with a view to making the amendment applicable to both civil and criminal cases.

The convention in its address to the people submitting the amendment to the consideration of the electors made the following notation:

"By this amendment no change is made in the right and the method of trial by jury in criminal cases, but if the law-making body so desires, provision may be made that in civil cases a verdict may be rendered in the event that not less than nine of the jurymen agree therein."

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Whatever weight may properly be given to the discussions of the convention and the address to the people is in favor of the construction that the amendment is to control the verdict of the jury in all cases other than criminal.

If the narrow view is taken that the amendments apply only to what are technically civil cases, it would lead to endless confusion and uncertainty in determining whether or not the three-fourths rule should apply in any particular case, as it would be first necessary to determine whether the cause being tried was technically a "civil action," or a special statutory proceeding.

Of all the amendments of the Constitution relating to judicial procedure, the one providing for a three-fourths verdict is by far the most valuable. Indeed, there are many who assert that the other amendments are more fraught with harm than with good, and it would be very unfortunate if a technical construction of the words "civil action" would limit this beneficial amendment to a certain class of cases and remove others from its benefits.

The court is clearly of the opinion that the constitutional amendment, and statutory amendments to carry the same into effect, provide for a three-fourths verdict in all cases tried in common pleas, municipal and justices' courts which are not criminal cases.

It would seem that Section 11212, General Code, would make the same rule apply to cases in probate court.

The other grounds set out in the motion for a new trial need not be further mentioned. The motion for a new trial is overruled.

LIEN OF DEBENTURE HOLDERS OF A CONSTITUENT COMPANY.

Common Pleas Court of Hamilton County.

**THE CLEVELAND TRUST COMPANY V. THE CINCINNATI, DAYTON &
TOLEDO TRACTION COMPANY ET AL.**

Decided, April Term, 1917.

Railways—Validity of Lien of Debenture Holders of a Constituent Company—Where the Consolidated Company Assumed all Debts and Liabilities of the Constituent Company—Property of the Old Company Treated as Still in Existence—Notice of Lien.

1. Debentures issued by a constituent company prior to consolidation have priority in the distribution of the fund derived from the sale

by a receiver of the property of the consolidated company, in so far as said fund was received for assets which formerly belonged to the constituent company, where the consolidated company "assumes all the debts, liabilities and contracts of the constituent companies and is to pay off and extinguish all debts and liabilities of every kind and nature of each constituent company."

2. Creditors of the new company will be held to have had, in law, notice of such lien, in the same manner that they would be held to have had notice of a prior recorded mortgage upon the same property.

Starbuck Smith, O. S. Bryant and Burch, Peters & Connolly,
for cross-petitioners.

Judson Harmon, of Cincinnati, and G. M. Cummings, of Cleveland,
for plaintiff.

GEOGHEGAN, J.

This matter came on for hearing upon the cross-petition of holders of certain debentures issued by the Dayton Traction Company of Dayton, Ohio, one of the constituent companies of which the defendant herein is the consolidated company. These debenture holders, among other things, pray the court to hold that these debentures constituted a first and best lien upon the property rights and franchises formerly belonging to the Dayton Traction Company and the Cincinnati & Miami Valley Traction Company, which guaranteed the payment of these debentures. They rely upon the decision of our Supreme Court in the case of *Compton v. Railway Company*, 45 Ohio St., p. 592.

I have carefully read the opinion of the court in the aforesaid case and have re-read same several times and have been unable to differentiate the case at bar from that case.

In the Compton case the agreement of consolidation provided, after setting forth specifically the bonded indebtedness, both secured and unsecured, of the Toledo & Wabash Railway Company, as follows:

"It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereon as the same shall respectively fall due, be protected by the said consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

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The agreement of consolidation which resulted in the formation of the Southern Ohio Traction Company, as well as the agreement of consolidation which resulted in the formation of the Cincinnati, Dayton & Toledo Traction Company, provide in each instance that the consolidated company "assume all the debts, liabilities and contracts of the constituent companies and is to pay off and extinguish all debts and liabilities of every kind and nature of each constituent company."

As I understand it, the holding of the Supreme Court in the Compton case, *supra*, was that upon the consolidation of railway companies under the Ohio statute the creditors of a constituent company are entitled to a lien upon the property acquired by the consolidated company from said constituent company, and that creditors of the consolidated or new company have in law the same notice of said lien as they would have of a prior mortgage upon the same property, the lien being a result of the proceedings under which the new company acquires its title to the property of the constituent company and the provisions of the statute under which said proceedings are had.

A careful examination of the opinion of the Supreme Court in the Compton case, written by Minshall, J., convinces one that the court did not consider that there was any extraordinary virtue in the use of the word "protect" in the agreement of consolidation, but did consider that the effect of the statutes authorizing the consolidation is, that notwithstanding the dissolution of the old company by consolidation, in so far as the right of a creditor is concerned in a suit by him for his debt and a judgment thereon, the old company is still deemed to be in existence and the debt is to be satisfied from the property owned by the old company at the time of the consolidation as if such proceedings in consolidation had never been had; that therefore a lien exists in favor of said creditor upon the property which the new company acquires from the old company as a result of the proceedings in consolidation, and that all creditors of the new company must, in law, be held to have had notice of such lien in the same manner as they would be held to have had notice of a prior recorded mortgage upon the same property. (Page 620.)

This, I think, effectually disposes of the question that the bondholders herein, represented by the Cleveland Trust Com-

pany, the plaintiff herein, had no notice of the claim of these cross-petitioning debenture holders.

It is true that the Supreme Court, in the Compton case, did discuss the stipulation in the articles of consolidation as to the protection by the new company of the class of bonds owned by Compton, but only regarded that as an additional reason why his claim should be granted. But the whole decision is based upon the idea that the statutes of Ohio authorizing consolidation of railway companies introduce a fiction whereby the property of the old company is held to be still in existence for the purpose of paying its debts.

It is true that the conclusion of our Supreme Court in this case is opposed by the decision of the Supreme Court of the United States in *Wabash, St. Louis & Pacific Railway Company v. Ham*, 114 U. S., 587, but the decision of the Ohio Supreme Court in the Compton case is the law of the state of Ohio, well recognized as such by the Circuit Court of Appeals of the United States, of the Sixth Circuit, in the case of *Adelbert College, etc., v. Wabash Railway Company*, 171 Fed., 805. In this latter case, Judge Lurton, speaking for the court, while refusing to follow the Compton case, recognized the decision as the law of Ohio.

Therefore, I have come to the conclusion that the cross-petitioning debenture holders are correct in their contention and that they are entitled to a first and best lien upon the property rights and franchises formerly belonging to the Dayton Traction Company and the Cincinnati & Miami Valley Traction Company. As these property rights and franchises are now represented by a portion of the fund in the hands of the receiver arising out of the sale herein, the court will make such an order as will protect the respective rights of all the parties hereto, in consonance, however, with the conclusion that the court has heretofore expressed.

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Shipp et al v. Brown et al.

**LEGALITY OF THE FILING OF PAPERS AFTER
OFFICE HOURS.**

Common Pleas Court of Licking County.

PAUL E. SHIPP ET AL V. CHARLES S. BROWN ET AL.*

Decided, April Term, 1916.

Reasonableness of Rule of County Clerk—Permitting Papers to be Treated as Filed as of Same Date—Where Left for Filing After Office Hours.

A transcript from a justice of the peace was placed, late on the thirtieth day after rendition of the judgment, in a box provided by the county clerk and placed at the door of his office for reception of papers left for filing after the closing of the office for the day, and on the following morning the transcript was stamped by the clerk as filed on the day it was placed in the box. *Held*: That the motion to dismiss the appeal on the ground that the transcript was not filed within the thirty day period should be overruled.

Phil. B. Smythe, for plaintiffs.

W. D. Fulton, contra.

BLAIR, J.

This case was submitted to the court upon a motion to dismiss the appeal upon the ground that the transcript was not filed on or before thirty days from the rendering of the judgment in the justice's court.

On the 28th day of April, 1915, plaintiffs obtained a judgment against the defendants before Fletcher S. Scott, a justice of the peace of Licking county. On the 28th day of May, 1915, a transcript of the proceedings before the justice was taken by the attorney for defendants and left at the clerk's office, in a box at the door, after office hours, and on the following morning, May 29th, the clerk marked the transcript filed as of May 28th, the attorney for plaintiffs at the time causing his objections to be endorsed on the back of the transcript by the clerk. The 28th day of May was the last day allowed by statute for perfecting the appeal by delivery of the transcript to this court.

*Error not prosecuted.

Section 10384 of the General Code reads as follows:

“Upon the giving of the bond for appeal the justice shall make a certified transcript of his proceedings, the bond included, which on the applicant’s demand and payment of the legal fee therefor shall be delivered to him, or his agent, who on or before the thirtieth day from the rendition of the judgment appealed from shall deliver it *to the court to which the appeal was taken.*”

And Section 10386 reads as follows:

“The clerk, on receiving such transcript and other papers as aforesaid, shall file them and docket the appeal.”

Section 10384 does not in express words require the delivery of the transcript to the clerk, but says:

“The appellant, on or before the thirtieth day from the rendition of judgment appealed from, *shall deliver it to the court to which the appeal was taken.*”

Was the placing of this transcript in a box in the clerk’s office after office hours a delivery to the court? The clerk so recognized it, for he marked it filed as of the day it was left at the office, and we will not disturb the action of the clerk in this respect. We think the clerk has the right to adopt reasonable rules for the transaction of the business of his office, and we think it not unreasonable for him to mark papers left in the box as of the date they were placed there, although the manual labor of marking them filed be not done until the following morning, and especially so where the rights of no third party have intervened.

We realize that the question raised by this motion is one upon which attorneys, and possibly courts, will differ, but we favor a policy which will permit all cases to be fully heard and disposed of upon their merits rather than a policy which will deny parties their right to have their matters litigated and determined by the courts. No authority cited by counsel, nor any which we have been able to find, throws any light upon the question.

An entry may be placed upon the journal overruling the motion, and exceptions noted; entry to bear date of the date of filing this opinion.

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**ILLEGAL ARRANGEMENT FOR SETTING ASIDE
A WILL.**

Common Pleas Court of Hamilton County.

ALICE DEXTER WALKER V. BURTON HOLLISTER ET AL.

Decided, October Term, 1917.

Wills—May Not be Set Aside by Consent or Collusion—Purchase of Legacies for Such a Purpose Illegal—Agreements Which Public Policy Does Not Permit—Circumstances Under Which a Will Contest Will be Dismissed.

1. The law of Ohio forbids the setting aside of a will by the consent or collusion of those who are interested as beneficiaries and contestants.
2. A scheme by one who is contesting a will, whereby it is sought to settle with the legatees by purchasing and securing assignments of their legacies, with the intention and for the purpose of having the will set aside, is illegal and against the public policy of this state.
3. It is contrary to the public policy of Ohio for agreements to be made by the contestant of a will, which have the tendency to retire litigants, who are legatees under the will, from the suit, and thus to make it possible for other legatees to be defeated in their rights.
4. Where the plaintiff in a suit to contest a will, undertakes to make an adjustment with the legatees by the purchase of their legacies, with the intention of setting aside the will, but succeeds in making an adjustment with only two of them, the continued prosecution of the suit contesting the will should not be permitted after the facts have been brought to the attention of the court, because the plaintiff is found to be on both sides of the suit. Equity will not permit the same person to hold under and against a will.

Counsel for the motions:

Charles B. Wilby and Elliott H. Pendleton, for Harvard College; Lawrence Maxwell and Joseph S. Graydon, for the Musical Festival Association; Worthington, Strong & Stettinius, for Spring Grove Cemetery, Fresh Air Fund, and the Children's

Home; *Charles A. Groom* and *Charles E. Weber*, for University of Cincinnati.

Counsel for plaintiff:

Dale & Dale, Joseph W. O'Hara and *Robert A. Black.*

GEOGHEGAN, J. (orally).

In February, 1916, Miss Annie L. Dexter, a member of an old Cincinnati family, died, leaving a will executed in July, 1914, which gave—

“To my faithful maid, \$10,000, and in case of the maid's (who was a widow) death, the legacy was to go to her son.

“\$5,000 to the Spring Grove Cemetery Association, ‘the income therefrom to be used for keeping in repair the Dexter mausoleum.’

“\$5,000 to the Cincinnati Musical Festival Association, ‘in memory of my uncle, Julius Dexter, a devoted friend and pioneer of said Association.’

“\$5,000 to the Fresh Air Fund, to be known as the ‘Mary Dexter Memorial Fund,’ in memory of my dear sister, Mary Dexter.

“\$3,000 to the Children's Home.

“\$2,000 to the Ohio Humane Society.

“To my nephew, Dexter Walker, my jewelry and all the family silver that is in my possession.

“To my nephew, Dexter Walker, the sum of \$20,000, to be held for him in trust by my executor, the income therefrom to be paid to him quarterly, for the use and benefit of my nephew's education, until he shall reach the age of twenty-one years, when said amount shall be paid over to him for his own property, provided he be willing to assume by law the name of Charles Dexter instead of Dexter Walker as he is now known. Should my said nephew refuse to take and bear the name of his grandfather Charles Dexter when he reaches the age of twenty-one years, then this said amount of \$20,000 shall be paid to the University of Cincinnati, to be known as the ‘Charles Dexter Memorial Fund,’ the income therefrom to be used in founding prizes or scholarships, to encourage young men in the study of the English language and literature.”

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The residue of the estate was given and devised "to the Harvard University of Cambridge, Massachusetts," said amount to be known as the "Charles Dexter Memorial Fund" in memory of my father, the income therefrom to be used in encouraging young men to study profoundly the English language, and for the foundation of scholarships to be known as the "Charles Dexter Scholarships."

The will was duly probated on April 5, 1916, and on April 8, 1916, Mrs. Alice Dexter Walker brought this suit to contest the will of her sister. Claudine Venot, the maid and companion of the testatrix, who was with her when she died and had been with her for many years, and who, according to her testimony before me, thoroughly believed in the mental capacity of the testatrix, was induced by the plaintiff in the latter part of April, 1916, to sign what on its face purports to be an answer in this case, setting forth that she joins in the prayer of the petition, in consideration of an agreement signed by the plaintiff, in which the plaintiff agreed to pay to said Claudine Venot the amount of her legacy of \$10,000, should the will be set aside and should the plaintiff receive the property of her sister's estate. That legacy of \$10,000 is referred to in that agreement as compensation, but this is contradicted by the will, which provides that this legacy, in case of the death of Claudine Venot, should go to her son. Claudine Venot testified that her compensation as maid had been fully paid to her up to a short time before the death of Miss Dexter, and that the balance thereafter coming due to her, had been paid to her by the executor. She also said that she had not understood the full purport of the answer, and it appeared that the meaning of the answer (her knowledge of English being limited) had not been explained to her.

Subsequently the plaintiff purchased the \$2,000 legacy of the Ohio Humane Society and paid \$1,000 for a written assignment, which authorized the executor to pay the legacy to her. The following May the plaintiff's attorney wrote to the attorneys of three other legatees, offering a certain sum for the assignment

of those legacies, and stating that a settlement had been made with other legatees, and that the intention was to cause the legatees to retire from the case.

On the argument, both oral and in their briefs, plaintiff's counsel admitted that the plaintiff had intended to compromise her action and to set aside the will through an adjustment with each beneficiary, and that in two instances there was an adjustment, one where a legacy was purchased, and one where a legatee was indemnified; that there was failure with the others because of the inability to come to terms.

On these facts the motions for the dismissal of the action, which were made by all of the legatees except those with whom the adjustment had been made, were presented to the court.

I have come to the conclusion, after a careful reading of all the authorities, that these motions should be granted, for two reasons: The first is that it is contrary to the public policy of Ohio, as I view it, for agreements to be made and entered into which have a tendency to withdraw litigants, who are legatees under a will, from a suit and thus make it possible for other legatees to be defeated in their rights. Whatever may be the public policy of other states, it is certainly the public policy of Ohio that wills should be sustained; that no agreements should be entered into which have for their object the setting aside of a will of a decedent.

In the case of *Wagner v. Zeigler*, 44 O. S., 59, the court at page 66 uses the following language:

"The language of the opinion in *Walker v. Walker*, 14 O. S., 157, is cited. Speaking of trial, by jury, Brinkerhoff, J., on page 176, says that 'This provision of the statute is imperative in its terms, and we have reason to believe that it was deliberately enacted with a view to prevent a disposition of cases for the contest of wills upon the mere consent or acquiescence of parties in any form.' This language, and the statute as well, may properly be read in the light of our knowledge of the mischief sought to be remedied, which was, speaking from tradition and history, a tendency to procure the setting aside of wills by consent decrees in chancery. The first statute upon the subject provided that, when the widow or person of kin appeared

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to contest the will, the court should take cognizance thereof and grant proceedings thereon according to law. This furnished an easy mode of disregarding the expressed wish and purpose of the dead testator, and necessitated a change, incorporating, as a requirement, trial by jury, as in the present statute. This statute, taken as a whole, negatives any idea that the Legislature intended to encourage the setting aside of wills; quite a contrary purpose is manifest."

I have also examined a great many authorities in other states with reference to this kind of contracts, and I have found that in some states there are authorities which hold that family arrangements made with the consent of all, with emphasis on the word *all*, of the persons interested in the will or heirs-at-law, may be sustained after the will is properly admitted to probate, upon the theory that all the beneficiaries may, after their interests have been determined for them, make any disposition of the property left or devised as they think proper. But I am strongly impressed by the language of the Supreme Court of Missouri in the case of *Ridenbaugh v. Young*, 145 Missouri, 274, in passing upon a contract entered into between a brother and a sister, whereby the brother agreed, after he had instituted proceedings in the Circuit Court of Buchanan County, in the state of Missouri, to set aside a certain will and testament of his father, to pay his sister, who was one of the beneficiaries and legatees under the will the sum of ten thousand dollars out of his share, and all the costs of the proceedings and attorney fees in case he succeeded in setting aside and annulling said will. The court in that case, discussing the question of public policy said:

"The all important question then is as to whether or not the contract is against public policy. Agreements relating to proceedings in civil courts involving anything inconsistent with the full and impartial course of justice therein, though not open to the charge of actual corruption, are void." 3 Am. & Eng. Ency. of Law, 879, 881. It is said that all agreements for pecuniary consideration to control the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or used

in their execution." *Tool Company v. Norris*, 2 Wall., loc. cit. 56. *Greenwood on Pub. Policy*, page 5, lays down the rule as follows:

"The question of the validity of the contract does not depend upon the circumstances whether it can be shown that the public has in fact suffered any detriment, but whether the contract is, in its nature, such as might have been injurious to the public. It matters not that any particular contract is free from taint, or actual fraud, oppression or corruption. The law looks to the general tendency of such contracts.' In speaking of contracts of this character in *Woodstock Iron Company v. Extension Co.*, 129 U. S., 663, Mr. Justice Field said: 'They are against public policy because of their corrupt tendency, whether lawful or unlawful means are contemplated or used in carrying them into execution.' 2 Wall. loc. cit., 56, it is said: The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country."

The rule is also stated in a note appended to the case of *Cochran v. Zachary*, 16 L. R. A. (N.S.), at page 237, as follows:

"But where the contract is not made by all the parties in interest, and the purpose and effect of it are to prevent or defeat the probate of a will, thereby to defeat the rights of certain legatees or devisees therein, not parties thereto, the courts passing upon the question are equally unanimous in holding it violative of public policy and void."

Such was the conclusion of the court in *Gray v. McReynolds*, 65 Iowa, 461; in *Wilson v. Jordan*, 3 Woods, 642, and *Mercier v. Mercier*, 50 Ga., 546, as well as in *Ridenbaugh v. Young*, which I have just cited.

I realize that the aforesaid cases were all in contract, and either in enforcement of contract or in repudiation or rescission of contract. But I believe when circumstances such as are shown to exist here are brought to the attention of the court, it is the duty of the court to declare as a matter of public policy that an action like this should not proceed; and I am somewhat strengthened in that position by the views of Judge Wanamaker, of our own Supreme Court, expressed in the case of *Pittsburg*,

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Cincinnati, Chicago & St. Louis Railway Company v. Kinney,
95 Ohio State (November 28, 1916), as follows:

"Sometimes such public policy is declared by constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man. It regards the primary principles of equity and justice and is sometimes expressed under the title of social and industrial justice, as it is conceived by our body politic."

And the court proceeds to rigorously uphold the right of any court where a course of conduct is presented that is shocking to the average man's sense of justice to hold that such course of conduct is contrary to public policy, though such policy has never been written in constitution, statute or decree of court. And this court earnestly concurs in that view, and applies it to the facts in hand. We have here, after an action has been brought, a confessed attempt to withdraw all the legatees, at least those legatees who may be included under the general term of charities, from the defense of this suit.

The plaintiff confessedly made an attempt to buy up all the legacies mentioned for the purpose of having this will set aside, or, as her counsel expressed it in his argument, to expunge this will from the record. Failing in her attempt to buy up all the legacies, the plaintiff entered into an agreement whereby she agreed to pay one of the beneficiaries, who would necessarily be an important witness, the amount of her legacy even though she were successful in breaking the will. Such an arrangement, whether made through corrupt motives or not, has an exceedingly vicious tendency, and is not in consonance with those principles which make for the true and exact administration of justice in the courts.

There is another reason why these motions should be granted, and that is based on a simple rule of equity. Plaintiff is on both sides of this suit; she is claiming under this will and against it. The rule depends on no principle of estoppel or of election,

but is simply a rule of equity that a person can not claim under a will and against it. That doctrine was enunciated early in England and was enunciated in this country in the time of Chief Justice Marshall. (See *Herbert v. Wren*, 7 Cranch, 370.)

I have read every case that counsel cited to me on the subject, and other cases found by independent search, and I do not find another case where the court repudiates that doctrine unless it be the case of *Kelley v. Hazzard*, 96 O. S. I can say to you now I have, to my own satisfaction, arrived at the conclusion the Supreme Court of Ohio did not intend by its decision in that case to repudiate that well established doctrine of law. In the first place, the court does not in its opinion refer to any of the well known cases on the subject. The facts of that case were simply these: An executor who evidently would have benefitted by the sustaining of the will induced a legatee to accept her legacy upon his false and fraudulent representation as to the conditions of her aunt's mind and the value of her aunt's estate. She discovered this fraud and offered to tender back the legacy and brought suit to set aside the will. The executor pleaded that she had accepted the legacy under the will and therefore she was not entitled to maintain the action. And she set up then as a matter of answer to his defense the fraud that had been practiced upon her, and the court in the case held that under such circumstances a plea of estoppel against her would not be available. I am frank to say that I do not think the question we have in this case was squarely presented to the court in that case. The court does not refer to a single case wherein the rule of equity I have just referred to is considered.

I can not bring myself to think that our Supreme Court intended to say that, where no fraud is present and the legatee has full knowledge of all the facts, that she might purchase, hold and claim an interest under a will and at the same time contest its validity. If this be so, then Ohio stands at variance with the authorities upon this proposition, a position I am unwilling to believe the court intended to assume.

The decision in *Kelley v. Hazzard* should not be extended beyond the limitations imposed by the particular facts of that case,

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and those facts are almost entirely dissimilar from the facts in the case at bar.

Therefore, having accepted the assignment of the legacy of the Ohio Humane Society, and having filed it with the executor, the plaintiff is now in a position to gain, no matter whether the will be sustained or set aside.

This position can not be sustained under the law and the motion will be granted.

NOTE.—The official reports having not as yet been published, the cases of *Railway Co. v. Kinney* and *Kelley v. Hazzard*, hereinbefore cited, may be found in the issues of THE OHIO LAW REPORTER of April 16, 1917, and October 8, 1917, respectively.

AS TO THE PAYMENT OF WARRANTS ON EMERGENCY LEVIES.

Court of Common Pleas of Brown County.

STATE OF OHIO, EX REL T. W. LOWE, v. CORNELIUS WILSON,
TREASURER OF BROWN COUNTY.

Decided, October, 1917.

Mandamus—Does Not Lie to Compel a County Treasurer to Pay Warrants on an Emergency Fund—While Injunction Suits Are Pending, Although No Restraining Order Has Been Issued.

The court will not compel by mandamus, a county treasurer to pay a warrant on a fund created by an alleged emergency levy under favor of Section 7419, General Code, when there is pending against said treasurer two suits in injunction, one of which seeks to enjoin the collection of the tax and the other to enjoin the treasurer from paying moneys from the fund so produced, where said suits attack the validity of the levy, notwithstanding the fact that no temporary order was issued in either of said suits for injunction and no bond given.

R. E. Campbell, for relator.

John R. Moore, for Treasurer of Brown County.

John M. Markley, Prosecuting Attorney of Brown County, appears as friend of the court.

STEPHENSON, J.

This is an action in mandamus to compel the county treasurer of Brown county, Ohio, to pay a warrant for county turnpike improvement from a fund created by a two-mill levy, which said tax was levied on all the taxable property of Brown county, Ohio, in the year of 1916 in pursuance of a resolution adopted by the board of county commissioners of said county, which said resolution in substance recites that said board of county commissioners have viewed the principal highways of said county, naming them, and find that said highways have been damaged by freshets and that by reason of the damage by freshets and by reason of the large amount of traffic on said roads, and from neglect and inattention to the repair thereof, they have become unfit for travel and cause difficulty, danger and delay to teams passing thereon.

Then said board makes a finding as to the amount that will be necessary to repair each road and upon aggregating the several amounts find that it will be necessary to levy two mills upon the taxable property of said county to place said roads in repair and such levy was made for the fiscal year beginning September 1, 1916.

Said resolution states that the procedure is had under and by authority of Section 7419 of the General Code of Ohio.

On February 3, 1917, George Kress, a tax-payer and resident of Brown county, on his own behalf and in behalf of all other tax-payers of said county, filed a petition in the Court of Common Pleas of Brown County against Cornelius Wilson as treasurer of said county to restrain the collection of said tax, and on April 18, 1917, an answer was filed to said petition and a demurrer was filed to the answer and such proceedings were had that a final judgment was had in said cause in said court of common pleas; that on June 25, 1917, said George Kress per-

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fect error proceedings in said cause in the Court of Appeals of Brown County, and said matter in error was heard in the court of appeals of said county on August 21, 1917, and said court rendered a judgment to the effect that the petition filed in said cause does not state facts sufficient to entitle plaintiff to any relief and the judgment of the court of common pleas was affirmed.

The court of appeals further found that the facts stated in the second and third defenses of defendant's answer to the petition of plaintiff would not constitute a good defense to a good cause of action, and the case was remanded to the Court of Common Pleas of Brown County for further proceedings according to law, and leave was granted plaintiff to file an amended petition setting forth the aggregate amount of the tax rate in the district involved.

On August 23, 1917, a mandate was sent to the court of common pleas and on August 28, 1917, leave was given to file an amended petition in the court of common pleas, and on the same day the same was filed.

On September 13, 1917, a demurrer to said amended petition was filed and the same is as yet undisposed of.

It is admitted that the tax sought to be enjoined is the two-mill levy made by the board of county commissioners in 1916, by virtue of the resolution hereinbefore referred to, and that this suit in mandamus is to compel the county treasurer to pay to the relator a warrant upon the fund created by said levy.

On September 4, 1917, George Kress, tax-payer and resident of Brown county, filed in the Court of Common Pleas of Brown County another petition against John E. Penny as auditor of Brown county, and the defendant in this cause as county treasurer, setting out the action of the commissioners of Brown county in making said levy, denying the existence of the basic facts set out in the resolution adopted by the board of county commissioners, and likewise setting out the aggregate amount of the levies of Pike and Clark townships, Brown county; that said levy was invalid and without authority of law and prayed that the auditor of said county be enjoined from issuing his war-

rant on the county treasurer for payment out of said fund and that the treasurer be enjoined from paying any money out of said fund for any purpose.

Said petition is still pending in the Court of Common Pleas of Brown County.

In neither of these suits for injunction was a temporary restraining order issued or served on the treasurer of Brown county or any injunction bond given.

In the instant action, plaintiff avers that Cornelius Wilson is the duly elected, qualified and acting treasurer of Brown county; that on or about August 20, 1917, and from said day to August 28, 1917, under contract duly made and entered into, plaintiff performed labor, furnished material and rendered services to Brown county, in, upon and about the repair and improvement of a certain free turnpike road in said county, known as Inter-county Highway No. 175, from New Hope to Mt. Orab, Ohio.

On the 29th day of August, 1917, the surveyor of Brown county approved and accepted plaintiff's work.

On August 29, 1917, plaintiff filed with the auditor of Brown county an itemized claim of the amount due him for said labor performed, material furnished and services rendered and on or about September 3, 1917, the board of county commissioners of Brown county duly allowed said claim and instructed and ordered the auditor of said county to draw his warrant upon the treasurer of said county, the defendant herein, for the amount of said claim.

On the 8th day of September, 1917, the auditor of said county drew his warrant upon the treasurer of said county and delivered same to relator. A copy of said warrant is set out, viz.:

“AUDITOR’S OFFICE, BROWN COUNTY.

“GEORGETOWN, OHIO, Sept. 8, 1917.

“No. 26925. Series A.

“*To the Treasurer of Brown County, Ohio:*

“Will pay to the order of T. W. Lowe, Eleven Hundred and Fourteen and 81/100 Dollars for Emergency Pike Pay-roll out of Emergency Pike Fund.

“Allowed by Comm.

“\$1,114.81.

JOHN E. PENNY, Auditor.”

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Relator further avers that there is money in the county treasurer's hands to the credit of the fund upon which said warrant is drawn for the use of said county and not otherwise appropriated, sufficient to pay his claim.

That on September 18, 1917, he presented said warrant to the treasurer of said county and demanded payment, but that said treasurer, defendant herein, refused and still refuses to pay same and he asks that a writ of mandamus issue commanding and requiring the defendant to pay said warrant or show cause why he should not be compelled to do so.

The treasurer answers this petition setting out in detail the different court proceedings, attaching to his answer the pleadings in the two suits for injunction.

The recital of the proceedings in each suit are pleaded as separate defenses and in each defense it is pleaded that the two-mill levy referred to in each petition is the levy from which the fund sought to be appropriated to the payment of the warrant set out in the petition herein is derived, and the same was for the year 1916, and was made by the county commissioners of Brown county for the repair of certain public highways under favor of Section 7419 of the General Code of Ohio.

The treasurer admits he refused to pay relator's warrant out of said fund and gives as his reasons for such refusal that he feared that if he paid same out of said fund, in the event of an adverse decision in the pending cases, he would be rendering himself liable, and he asks the direction of the court in the matter of such payment.

A general demurrer is filed by relator to each of said defenses and to the answer as a whole.

For the purposes of the demurrer, all matter well pleaded in the answer is admitted by relator.

This case turns upon the question whether or not Cornelius Wilson, as treasurer of Brown county, was vested with any discretionary power, under all the circumstances, to refuse to pay relator's warrant, and if he had such discretionary power, did he abuse it.

The legal atmosphere surrounding this question in this state is a bit hazy. Ohio cases may be found holding that the treas-

urer is a purely ministerial officer. Other Ohio cases may be found to the effect that the treasurer has a discretion in the payment of public moneys.

We are confronted with a new rule governing public expenditures. This rule was announced by Judge Wanamaker on March 6, 1917, viz.:

"In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power." *State, ex rel A. Bentley & Sons Co., v. Pierce, Auditor*. 95 O. S., — (reported in Ohio Law Reporter October 1, 1917).

It may be argued that this case has no application to the case at bar. That the question in the case referred to was a question as to the right of an administrative board under its statutory grant of authority to expend certain moneys.

The fact that an administrative board is referred to in this case and not an administrative officer would make no difference. The real question is the authority of the board or public officer to expend public moneys, and if the right or authority is not clear or doubtful it must be resolved in favor of the public.

In the case cited, the court, in the application of this rule, denied power to the trustees of the Clark County Memorial Building to expend money, that was the usufruct of money they had perfect right to expend.

It will hardly be contended that a county treasurer is not a ministerial officer, but ministerial officers may be required to perform duties that are *quasi-judicial* or discretionary.

If the duty of the treasurer in this case, in the payment of this warrant under all the circumstances, is purely ministerial or administrative, the writ should be allowed, but if the treasurer under all the circumstances is entitled to exercise a sound discretion and he does exercise it and does not exceed or abuse it, the writ should be refused.

Mandamus lies to compel a treasurer to pay a warrant regular and valid on its face, there being nothing before the court by way of proof or admissions in the pleading to overcome the pre-

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sumption that the warrant was lawfully issued for valid indebtedness. 26 Cyc., p. 234 and cases cited.

In the case at bar we have in the pleadings and in the case as it now stands before the court admissions sufficient to overcome the presumption that the warrant was lawfully issued for valid indebtedness of the county. (It must be remembered that all allegations of fact that are well pleaded in the answer of the treasurer are admitted for the purpose of the demurrer.)

It is insisted by counsel that the treasurer is not bound to pay any attention to either of these injunction suits, as no temporary order was allowed in either case and no bond given and that an order of injunction has no legal efficiency until the bond is given and the order is issued and served.

That is good law, supported both by statutory provision and by decisions of the Supreme Court.

It is not a question of the operation and effect of these injunctions, but the question is, under all the facts pleaded by the treasurer and admitted to be true by the relator, should the treasurer pay or refuse to pay this warrant?

A public officer is liable officially for misfeasance or malfeasance in office.

He is liable in most jurisdictions individually, when under color of office he does some acts, clearly *ultra vires* and entirely divorced from the duties of the office that results in damage.

Has the treasurer in this case pleaded facts sufficient to put a man of ordinary caution and prudence on inquiry?

If he has, then he (the treasurer) has notice of present conditions and if he as a public officer with notice failed to use the prudence and discretion that the ordinarily prudent and discreet man would under similar circumstances, would he not be guilty of official misconduct and liable on his official bond?

If the treasurer has notice at all, he has notice that the claim is made that the levy that created the fund from which it is sought to have this warrant paid is invalid and without authority of law, and tax rates are set out to show whether or not the limitation prescribed by law has been exceeded. That is not all; the treasurer as such is charged with a knowledge of the tax rate in

each taxing district of his county, regardless of actions at law or suits in equity.

Suppose in the face of all this knowledge he pays this fund out and the courts subsequently hold that the levy is void and suit is instituted against the county to recover back the taxes paid, where would the liability rest?

That is not all. There are two suits pending in which the same question is involved that is involved in this case.

Has the court under such circumstances any authority to allow the writ?

This court thinks not. See 26 Cyc., p. 184.

The court is of the opinion that the treasurer did what was demanded of him as a public officer, when he refused to pay the warrant under the circumstances related by him in his answer.

The demurrer to the first and second causes of action separately and severally is overruled and the demurrer to said answer as a whole is overruled. Exceptions of plaintiff are noted. Plaintiff may have five days to further plead, if desired; if not, the judgment of the court will be that the writ be refused.

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**PROHIBITION OF PUBLIC MEETINGS ON THE STREETS
WITHOUT A PERMIT.**

Criminal Court of Canton.

CITY OF CANTON V. T. H. ROBERTSON.

Decided, October, 1917.

*Free Speech—Constitutional Guaranty of, Not Violated—By Ordinance
Requiring a Permit to Hold a Public Meeting in the Street—Power
to Issue Such Permits Property Lodged in the Director of Public
Safety—Socialistic Meetings Prohibited.*

1. A city ordinance making it unlawful for any person to hold a public meeting for the purpose of speaking whereby a number of people are gathered together so as to delay traffic or interfere with the free and uninterrupted use of the streets of a city, unless such person shall first have obtained a permit so to do from the director of public safety of said city, is a valid ordinance.
2. The requiring of a permit, as set forth in the first syllabus, does not take away the constitutional rights of the people to assemble, nor does it interfere with the rights of free speech, guaranteed by the Constitution of the state of Ohio and the United States of America.
3. It is the duty of a city council to keep the streets open and free from nuisance.
4. It is within the power of a city council to delegate to the safety director the authority of granting or refusing permits to speak on the public streets, whereby a number of persons are gathered together so as to delay traffic or interfere with the free and uninterrupted use of the street by the public.

Herbert E. Hunker, for City.

Allen Cook and Jas. A. Rice, contra.

QUINN, J.

This is a case wherein the defendant, T. H. Robertson, is prosecuted on the following charge:

“Before me, Wm. B. Quinn, Judge of the Criminal Court of Canton, Stark county, Ohio, personally appeared S. A. Lengel, who, being duly sworn according to law, deposes and says that on or about the first day of September, 1917, at the city of Canton, in the said county of Stark, one T. H. Robertson did unlawfully hold a public meeting in and upon a public street in said city, to-wit, on Walnut avenue, S. E., for the purpose of speak-

ing, whereby a number of people was then and there gathered together so as and in such manner as to interfere with the free and uninterrupted use of said street, and then and there the free and uninterrupted use of said street was interfered with by said people so gathered together, he, the said T. H. Robertson, not having first obtained a permit to hold said meeting in said street from the director of public safety of said city as required by law, contrary to the form of the ordinance of said city in such cases made and provided, and further the deponent says not."

The affidavit charges a violation of the following ordinance:

"ORDINANCE No. 2061.

"Ordinance No. 2061 making it unlawful for persons to hold public meetings upon any street, avenue, park or public place in the city of Canton, unless a permit therefor is first obtained, and providing a penalty for violation thereof.

"Be it ordained by the council of the city of Canton, state of Ohio,

"Section 1. It shall be unlawful for any person to hold a public meeting for the purpose of speaking, lecturing or for any religious purpose or for any similar purposes not named herein, whereby a number of people are gathered together so as to delay traffic or interfere with the free and uninterrupted use of the streets, avenues, alleys, parks and other public places in the city of Canton, unless such person shall first have obtained a permit so to do from the director of public safety of said city.

"Section 2. Said permit may be issued by the director of public safety upon the application of the person desiring the same, who shall state in said application the nature and object for which said permit is desired, and if said application is allowed, it shall then be the duty of the director of public safety to specify the location where such public meeting, lecture or religious meeting may be held, which location shall be plainly set out upon the permit together with the hours and the day or days when said permit may be used; provided, however, that the permit herein provided for shall in no case authorize the holder thereof to hold any meetings for the purpose or purposes named herein nearer than fifty (50) feet to the intersection of any street, avenue or alley within the city of Canton.

"Section 3. The director of public safety, upon being satisfied that any of the provisions of this ordinance have been violated, may at his discretion revoke the privilege conferred by the permit herein provided for.

"Section 4. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than

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ten (\$10) dollars, nor more than fifty (\$50) dollars, and the costs of prosecution.

"Section 5. This ordinance shall be in force and effect from and after the earliest period allowed by law."

A demurrer has been filed by the defendant upon the following grounds, to-wit:

1. Said affidavit does not charge any offense in law.

2. The pretended ordinance under which said affidavit is filed is wholly void and without legal effect or force in law, because it contravenes and is in violation of the following sections and articles of the Constitution of the state of Ohio:

A. Article I, Section 3, which is as follows:

"The people have the right to assemble together, in a peaceable manner, to consult for their common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances."

B. Article I, Section 5, which is as follows:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

C. Article I, Section 11, which is as follows:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

3. The pretended ordinance under which said affidavit is filed is wholly void and without legal effect or force in law because it contravenes and is in violation of the following articles in addition to the amendment of the Constitution of the United States:

A. Article I, which is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

B. Article VI, which is as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Many authorities have been cited by counsel for the defendant on the question of free speech and it is claimed by defendant that this ordinance is invalid for the reason that it deprives the defendant of his constitutional right of free speech. Also that it prevents the exercise of the constitutional right of the people to assemble in a peaceful manner. An examination of the provisions of the ordinance does not reveal any questions such as defendant has attempted to raise involving the right of the people to assemble and the freedom of speech, as guaranteed by the Constitution of the United States. The question presented is rather one involving the free use of the streets for the holding of meetings and the delivering of speeches.

Section 3714 of the General Code of Ohio provides that:

"Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

There is not any question but what the council has the power to keep the streets open and free from nuisance. The question, then, presents itself, is the passage of the ordinance in question within the right of the council? The court is of the opinion that council not only has the right to keep the streets open and free from nuisance, but that under Section 3714, a duty is imposed in mandatory language requiring the doing of these things. Keeping in mind the fact that the city holds the use of the streets in trust for the public for street purposes, and that streets were not primarily dedicated to be used as public meeting places, but for purposes of traffic by pedestrians and vehicles of all description, the court is strongly of the opinion

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that the council is not only authorized, but obliged, to prevent the use of our streets and highways for holding meetings whereby a number of people are gathered together so as to interfere with the free and uninterrupted use of the streets, and so as to delay traffic. The fact that it may be more convenient for those who may desire to hold public meetings in the streets, where crowds are more easily attracted and expenses are nothing, does not make it a constitutional privilege, included in the constitutional right of our citizens, to gether peaceably together for the purpose of debating on questions of general welfare and the privileges also given by the Constitution respecting free speech.

Therefore, for the purpose of this decision, we are eliminating as absurd the argument that the right of free speech is denied by this ordinance, because the streets are to ride and walk upon instead of delivering sermons, lectures and speeches upon, and because nowhere in the Constitution does it guarantee free speech, absolutely unlicensed, at any time or place, and especially not upon the public streets.

We now come to the main question raised by this demurrer, that is, is this ordinance invalid because of the fact that the council, who unquestionably have the right and duty of keeping the streets open and free from nuisances, have delegated the right to the safety director of the city to grant permits for the holding of public meetings under certain conditions on the streets? Section 2 of the ordinance provides that said permit may be issued by the director of public safety upon the application of the person desiring the same, who shall state in said application the nature and object for which said permit is desired; and if said application is allowed, it shall then be the duty of the director of public safety to specify the location where such public meeting, lecture, or religious meeting may be held, which location shall be plainly set out upon the permit used; provided, however, that the permit herein provided for shall in no case authorize the holder thereof to hold any meeting for the purpose or purposes named herein nearer than fifty feet to the intersection of any street, avenue, or alley within the city of Canton.

Section 3 of the ordinance provides that the director of public safety, upon being satisfied that any of the provisions of this

ordinance have been violated, may at his discretion revoke the privilege conferred by the permit herein provided for.

It is claimed that this delegation of somewhat arbitrary power to one man by the council is unreasonable and in excess of council's authority. Let us consider some of the authorities cited by counsel on both sides.

In the 162 Mass., page 510, case of *Commonwealth v. Davis*, we have an ordinance somewhat similar to the Canton ordinance providing that in the city of Boston no person shall, except by permit from the mayor, make any public address in or upon the public grounds of the city. It was held by the Supreme Court of Massachusetts, Judge Holmes, I believe the same man now in the Supreme Court of the United States, that said ordinance was constitutional and that the words, "public address" would apply to sermons delivered on the Boston Commons.

The court says in its opinion at page 511, that the argument that the ordinance is unconstitutional assumes that the ordinance is directed against free speech generally, whereas in fact it is directed toward the modes in which the Boston Commons may be used.

"There is no evidence before us to show that the power of the Legislature over the commons is less than its power over any other park dedicated to the use of the public, or over public streets the legal title to which is in a city or town. As representative of the public, it may and does exercise control over the use which the public may make of such places, and it may, and does, delegate more or less of such control to the city or town immediately concerned. For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes, the Legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the lesser step of limiting the public use to certain purposes.

"If the Legislature had power under the Constitution to pass a law in the form of the present ordinance, there is no doubt that it would authorize the city of Boston to pass the ordinance. * * * It is settled also that the prohibition in such an ordinance, which would be binding, if absolute, is not made invalid by the fact that it may be removed in a particular case by a license from a city officer, or a less numerous body

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than the one which enacts the prohibition." Citing *Commonwealth v. Ellis*, 158 Mass., 555.

This case seems very much in point, inasmuch as Article 39 of the statutes of Massachusetts conferred upon the city council the care and management of the public buildings and of all the property of the city. So, in the case at bar we have the council given the right and duty of keeping the streets open and we have an ordinance passed by them prohibiting all meetings which delay traffic or interfere with the free and uninterrupted use of the streets, unless under certain conditions the safety director issues a permit. The city council could have absolutely prohibited the holding of public meetings on the street in such a way as to interfere with the primary use of the streets. Under the wording of the ordinance, meetings are not prohibited on the streets, which do not interfere with traffic or interrupt the free use of the streets by the public. It is not necessary to get a permit where traffic will not be delayed or the free use of the streets of the public interfered with by the meeting. But even where there is a delay of traffic, or interference with the free use of the streets on the part of the public, a permit may be given at the discretion of the safety director. Because the council, the legislative body, has the right to enact necessary legislation, it does not necessarily follow that they must enforce the provisions of the legislation themselves. When it comes to a matter of enforcing the law, it is up to the executive officers named by the council. Who is better fitted than the safety director, who is in charge of the fire and police departments and public safety generally, to pass upon the questions involved in the granting of a permit. He knows, or should know, where traffic is thickest. He is in a position to know the needs of the fire department for a clear street in rushing to a fire. He knows how many police are available to keep order in the street crowds, and I can not see how there could be any better method devised for granting this special permit than the one provided for in this ordinance. It is contended that the safety director, in enforcing the present ordinance, has acted unfairly in that he has refused permits except under undesirable restrictions to the Socialist party. If the right to use the streets for public meetings was a natural, or constitutional, or inalienable right, then this argument might have some force; but here is a request made

for the use of the streets which, while customary in small towns where there is not much traffic, yet is a request for a right to interfere to some extent with the general public's right to use the streets for the benefit of some particular organization?

Another thing to be considered is the fact that every time the city extends this right through the safety director, the city throws itself liable in case of accidents and personal injuries growing out of said meetings and said gathering in the streets. Suppose there was no discretionary restriction of this special privilege which may be granted. Every organization, religious, political, fraternal, of every kind whatsoever that might choose to do away with the expese of hiring a hall, could select the most desirable places on the public streets and hold forth regardless of the rights of the general public. In these days of many automobiles, street cars and pedestrians, we have arrived at the stage when the general good demands that public speeches be held on vacant lots or in places other than the public streets.

We have many laws enacted by the council because of legislative authority where the council has the right to, and does, delegate certain duties and discretion to executive officers of the city. Take, for instance, the plumbing laws of the city. The Legislature gives the council power to enact ordinances and the council in its ordinance delegates to the board of health authority to fix rules and regulations and even provide penalties. The constitutionality of this plumbing law has been upheld by the higher courts in numerous decisions. If the ordinance in question had provided that even in the cases where traffic would not be delayed and free use of the streets interfered with by the meeting, it would be necessary to get a permit from the safety director, then there would be more merit to defendant's contention, as council would be going beyond their duty to keep the streets open, and therefore the delegation of authority to the safety director would possibly be beyond their power.

Counsel for the defendant have cited many authorities on the point involved. The court has examined all of them, but finds that most of them are not in point for the reason that they are decisions in cases where by said ordinances it was sought to prevent parades on public streets. The distinction is that the use of the streets for parades and processions is an entirely dif-

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ferent use than that of the streets for holding public meetings. The parades move along and do not interfere to any great extent, with the ordinary use of the streets by others, whereas the meetings involved in the case at bar are stationary and do interfere with the rights of others. In a number of the cases cited the courts held it to be an unreasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to parade the streets, with music, etc. The courts also held that laws to regulate parades must fix conditions expressly, and so that such conditions operate on all of the same class alike, and must not give the power of permitting or restraining processions to an unregulated official discretion.

In the case at bar the safety director is only given this discretionary power in cases where the natural and primary use of the street by the public is interfered with, and, as hereinbefore stated, the defendant is in no position to complain, because the privilege in the first place is not a matter of right.

In the 87 Iowa, at page 226, it was even held that an ordinance giving the mayor or marshal the right to stop parades conducted in such a manner as to obstruct or impede public travel on the streets, was valid. This was held notwithstanding the fact that to refuse to desist upon command of the mayor or marshal made one guilty of a misdemeanor.

In these days, where public affairs have become complicated because of the use of new inventions and the increase of population, it has become necessary to centralize responsibilities and to delegate authority in many ways. We have our humane workmen's compensation laws, where power is delegated by the Legislature to the Industrial Commission to make allowances of compensation even in cases where the manufacturers have not chosen to take industrial insurance. There have been test cases taken to the Supreme Court of Ohio wherein the manufacturers contended that to allow a board of this kind to give judgment against them was taking their property without due process of law and depriving them of their constitutional right to a jury trial; but the Supreme Court of our state, as well as the courts of other states, have always decided that the laws were constitutional. There may be some abuses of the discretion on the part of some of the executive officers who are given these discretionary powers, but on the whole they are used advantageously.

Take, for instance, the great powers given to the liquor license commissions and the interstate commerce boards. These rights were always questioned at first as being unconstitutional, but, nevertheless, they were upheld by the courts.

Another contention of counsel in this case is that this ordinance deprives the defendant of his constitutional right to a trial by a jury, because of the fact that a violation is punishable only by a fine, and, under the laws of Ohio, where imprisonment is not part of the possible penalty, a jury trial can not be demanded. We do not believe that in view of the many decisions in this state involving the same question, that that contention can be seriously considered.

Another authority on the question of the delegation of power to one man is the case of *Hall v. Geiger-Jones Company*, decided by the Supreme Court of the United States during the past year. It was there contended that the power of the superintendent of banks to pass on the question of reputation and the past record of applicants for a license to do business under the state banking laws was too arbitrary, and the court says:

"It is certainly apparent that, if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In *Gundling v. Chicago*, 177 U. S., 183, 44 L. Ed., 725, 20 Sup. Ct. Rep., 633, an ordinance of the city of Chicago was passed on which required a license of dealers in cigarettes, and, as a condition of the license, that the applicant, if a single individual, all of the members of the firm, if a co-partnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained."

Wherefore, the court is of the opinion that the ordinance in question, in so far as the defendant is in a position to complain of it, is valid, and defendant's demurrer is overruled.

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Ironton Garage Co. v. McKee.

**COMMON LAW LIEN NOT WAIVED BY THE LEVYING
OF AN ATTACHMENT.**

Common Pleas Court of Lawrence County.

THE IRONTON GARAGE COMPANY V. GEORGE MCKEE, AS CONSTABLE.

Decided, November 26, 1917.

*Lien—Acquired Upon an Automobile for Labor and Materials—Not
Waived or Destroyed by Subsequent Judgment in an Attachment
Proceeding.*

One who has a common law lien on personal property by reason of
having performed labor and care upon it, does not lose nor waive
such lien by levying an attachment upon the property.

Heard on motion for a new trial.

W. L. Elkins and *Jed B. Bibbee*, for the motion, cited and commented upon 45 O. S., 222; 5 Ohio, 98; 50 L. R. A., 720 (note); 34 Mass., 140; s. c. 28 Am. Dec., 282; 68 Iowa, 460; s. c. 27 N. W., 459; 45 N. W., 81; 132 U. S., 220; 10 Dec. Rep., 424 (21 Bull., 122); 81 O. S., 280; 1 N.P.(N.S.), 273; 2 C.C., 381; 83 O. S., 378; 26 O. S., 659; 4 Elliot on Contracts, 297; 28 Am. Dec., 282; 3 Bates Pleading and Practice, 2452.

Andrews & Irish, contra, cited and commented upon *I Jones* on Liens, 731, 44, 12; Ohio Lien Laws (Treadway and Marlett, 2d Edition), Section 163; 83 O. S., 378; 44 L. R. A., 561; 20 Pick, 399; 25 N. H., 155; 31 Mass., 332; 68 Am. Dec., 539; 178 Mass., 163; 49 Pac., 768; 146 Pac., 665; 68 C. C. A., 19; 9 N.P. (N.S.), 268 (affd. 86 O. S., 313).

CORN, J.

One Deffner placed with plaintiff his automobile for repairs, and upon which plaintiff expended labor and materials to the amount of \$41.70, and of which plaintiff retained possession until payment should be made. While so in the possession of plaintiff, one Wilbur Jones caused it to be attached for a debt due him from said Deffner.

Subsequently, the plaintiff itself sued out, and caused to be levied by the defendant, an attachment against the automobile for its claim for repairs, but which, so far as the evidence discloses was not prosecuted further.

In due time, the justice sustained the attachment of Jones and ordered a sale. The plaintiff, claiming that it had never yielded possession to the officer under the Jones attachment, refused to surrender it for the sale and the officer forcibly took it from the possession of plaintiff and advertised and sold it under said attachment. Plaintiff brought an action in replevin, but no bond being given for the possession, the action proceeded as one for damages (General Code, 12070), resulting in a verdict for plaintiff in the sum of \$50.

Counsel for the motion insist upon two grounds:

First. That the verdict is against the manifest weight of the evidence.

Second. That the court erred in refusing to direct a verdict for defendant at the close of plaintiff's evidence, it affirmatively appearing, at that stage of the proceedings, that plaintiff had caused an attachment to be levied upon the property, for the labor and repairs upon which it was asserting a common law lien, and that thereby it lost or waived such common law lien.

All I care to say about the first ground is that the testimony is in conflict, and believing that the rules of law applicable to the case were properly expounded to the jury, and the questions of fact, the credibility of the witnesses, and the weight to be given to their testimony all being within the special province of the jury to determine, the verdict should not be disturbed upon that ground.

The second ground presents a question of law upon which both text-writers and courts are in conflict, and it seems that it is impossible to harmonize the decisions.

The jury, by its verdict, found that possession of the automobile was not surrendered by plaintiff to the attaching officer under the Jones attachment, and I have already indicated that I am not disposed to disturb that finding; so that a naked proposition of law presents itself:

"Does one lose or waive his common law lien for labor and materials expended upon personal property by subsequently levying an attachment upon the property for the debt?"

Counsel, after much diligence, have been unable to cite, and I am not advised of any reported case in Ohio decisive of the question, and, as before stated, reported decisions from other states appear to be in sharp conflict.

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Ironton Garage Co. v. McKee.

But following the reasoning of Judge Shauck, *Green v. Bass*, 83 O. S., 384, there should be no good reason why a lien or security should not continue until the discharge of the obligation, unless such lien is lost by an *intentional* waiver, or when depending upon possession, then by a voluntary surrender of such possession. And the intent to waive must be express, or very clear and plain. The presumption is always against it. (44 L. R. A., 561.)

It is claimed, however, upon some very respectable authority that levying an attachment upon the property is such waiver, and

“is in effect an assertion that the property belongs to the defendant.”

These are conclusively answered by Justice Brannon in *Lambert v. Nicklas*, 44 L. R. A. (W. Va.), 561, 564, as follows:

“It is argued that judgment in this action merged and destroyed the lien. Judgment does not merge the cause of action so that it can not be sued on again; but I understand that in law, the debt is one thing, and its lien on given property another thing, and that judgment does not destroy the lien. The creditor may enforce both, and his election of one does not exclude the other as a remedy.” (See also 83 O. S., 378.)

“As to the clause from Jones that the attachment is in effect an assertion that the property attached belongs to the defendant, I will say that there is no force in it, because by claiming a lien the plaintiff asserts that it belongs to the defendant as much as by attaching it; he asserts the same thing by both lien and attachment, and no estoppel can, therefore, be based upon any contradiction between the two.” * * *

“In *Arendale v. Morgan*, 5 Sneed, 703, the question is considered and the court refused to follow that doctrine, and held that where one has property in pledge for debt and parts with possession, with intent to abandon the lien, as if he agrees that it be attached at the suit of a third person, it is gone; but not so, where he attaches for his own debt. This is the true position.”

It is claimed further by counsel for the motion that when the officer levied on the property in question, plaintiff lost his lien because he must, under the circumstances, give up possession. Following the reasoning in *Lambert v. Nicklas*, *supra*, the officer is the agent for the plaintiff for the purposes of the attachment; to say otherwise is technical in the highest degree and defeats justice. The plaintiff is not surrendering possession to

the owner nor to anyone else acting in the furtherance of the owner's demand. The plaintiff could bring suit without forfeiting his lien, and by resorting to an attachment he simply avails himself of a fact giving him the right to an attachment to enforce a debt for which there is a lien, using a cumulative remedy.

To the same effect are the following: *West v. Fleming*, 68 Am. Dec., 539; *Angier v. Bay St. Dist. Co.*, 178 Mass., 163; *A. S. L. Lithographing Co. v. Ibez Mine Co.*, 49 Pac., 768; *Martin v. Becker*, 146 Pac., 665.

The authorities answering in the negative the proposition of law herein propounded being, to my mind, more consonant with sound reason and the principles of justice, I am constrained to follow them, rather than those cited to the contrary.

The motion for a new trial, therefore, will be refused and judgment entered upon the verdict.

PARTNERSHIP LIABILITY.

Common Pleas Court of Hamilton County.

ALICE K. WIEBE V. METZ & WIEBE ET AL.*

Decided, December, 1916.

Promissory Notes—Proceeds of Note Executed by Individual Member Used in Partnership Business—No Recovery Thereon Against the Partnership.

One who has paid the note of an individual member of a partnership is without right of recovery against the partnership, either on the note or for money had and received, notwithstanding the proceeds of the note were used in partnership business.

Cobb, Howard & Bailey and *H. L. Rockel*, for plaintiff.
Michael Minges, contra.

*This case was taken to the Court of Appeals on error where the judgment was affirmed in the following memorandum opinion:

"This case is controlled by *Peterson v. Roach*, 32 O. S., 374, which was followed in *McKee v. Hamilton*, 33 O. S., 7, 15, and *Norwalk National Bank v. Sawyer*, 38 O. S., 339.

"Notwithstanding the criticism of *Peterson v. Roach* found in *Merchants National Bank v. Little*, 4 C. C., 195, 201, it is binding upon this court as an authority.

"The judgment is therefore affirmed upon the opinion of the trial judge."

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Wiebe v. Metz et al.

MAY, J.

The jury in this case found for the plaintiff on her second cause of action.

The defendant filed two motions, one for a new trial, and one for a judgment, notwithstanding the verdict of the jury.

I am of the opinion that the motion for a new trial should be overruled and that a judgment should be entered for the defendant notwithstanding the verdict of the jury, in accordance with the case of *B. & O. R. R. v. Nobil*, 85 Ohio St., 175. This latter motion can only be granted if the defendant is entitled to such a judgment upon the pleadings without reference to the evidence. An examination of the pleadings in this case convinces me that the defendant is entitled to a judgment thereon, notwithstanding the verdict of the jury in this case.

The plaintiff in her second cause of action alleges that a partnership existed between H. E. M. and E. J. W. and that prior to July 28, 1913, the partnership borrowed \$200 from the German National Bank of Newport, Kentucky, in the name of E. J. W., and that there was due on that date \$180, and that the loan was evidenced by a promissory note which is set out in the petition, signed E. J. W. and F. W. F., who was not a member of the partnership; that the partnership being unable to pay the note at maturity, requested the plaintiff to pay and that they would repay the plaintiff. Thereupon the plaintiff paid the note for \$180, for which she asks judgment.

She further alleges that the money borrowed by E. J. W. was used to pay firm debts.

The partnership, M. & W. and H. E. M., filed separate answers denying that money was borrowed in the name of the firm from the German National Bank or in the name of defendant, H. E. M., and denying that any part of the money borrowed from plaintiff went to pay partnership debts of the defendant partnership or the defendant, H. E. M.

The plaintiff in her reply claims the right to be subrogated to all rights of the German National Bank of Newport, Kentucky, against the partnership.

Under the pleadings, therefore, the question to be determined is whether the plaintiff can recover against the partnership and against H. E. M. individually on the note executed by E. J. W.

with surety in a member of the partnership, to the German National Bank of Newport, Kentucky, which note upon its face is marked "*paid July 28, 1913.*"

I am of the opinion, under the authority of *Peterson v. Roach*, 32 Ohio St., 374, that the plaintiff can not recover. In that case the court held:

"Where a partner borrows money on the credit of his individual note, which is signed also by a surety, such borrowing does not create a partnership debt, though the money be applied to partnership purposes; and the principal of such surety is the individual partner, with whom he joins in the execution of the note, and not the partners generally."

This case is decisive of the case at bar as made up by the pleadings. The case of *Peterson v. Roach* was followed and approved in *McKee v. Hamilton*, 33 Ohio St., 7, at page 15, and in *Norwalk National Bank v. Sawyer*, 38 Ohio St., 339. In this case the court held:

"Money borrowed by one partner, on his individual credit, will not become a debt of the firm by being used in its business; and the rule is not different where the money was loaned for the purpose of enabling such partner to pay to the firm his portion of a specified sum which each partner had agreed to contribute in order to increase the firm's capital."

If the plaintiff seeks to recover for money had and received to the use of the firm debts, as is argued by counsel for plaintiff, then the petition discloses that the promise of E. J. W., one of the members of the firm, was made without consideration and not for partnership purposes. Therefore, taking either horn of the dilemma, whether the cause of action, as disclosed by the petition and the reply, is on the note, or whether it be for money had and received, the defendant partnership firm and H. E. M. are entitled to judgment notwithstanding the verdict of the jury.

Inasmuch as the defendant, E. J. W., confessed individual liability to the plaintiff, the judgment entry that is to be drawn in this case may be for a judgment against him for the amount of the verdict.

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SPECIAL VERDICTS.

Common Pleas Court of Cuyahoga County.

EVA M. HILL v. THE CLEVELAND RAILWAY CO.

Decided, June 27, 1917.

Plaintiff and Her Niece Attempt to Board Car—Plaintiff Enters But Door is Shut in Face of Niece—Plaintiff Demands of Conductor That Niece be Permitted to Enter or Herself Leave—Conductor Intimates She Better Leave and Opens Door—While Alighting the Car Started and Plaintiff Was Thrown Upon the Pavement—and Permanently Injured—Verdict for \$17,000 Sustained—Special Verdicts—Section 11462.

1. When a special verdict is requested, under favor of Section 11462, General Code, it is proper practice for the party requesting it to present such form of special verdict as he thinks the evidence warrants, which, with form presented by the other side, if any, may be given to the jury for its use, under instructions that they are not bound to use any form presented, but may themselves prepare one of their own entirely different, as they may find the facts to be from the evidence in the case.
2. It is not error for the jury to be informed as to which parties presented the several forms of special verdict, if such are prepared for their use.
3. A special verdict being requested, the court is bound to instruct the jury as to the issues in the case and the proper form of the verdict and the specific facts to be found; if, however, the court goes further and also instructs generally as to the law of the case as he would were no special verdict requested, there is no prejudicial error for which a new trial should be granted, provided the charge so given is a correct statement of the law.
4. If a special verdict returned by the jury finds not only the facts as established by the evidence, but also contains conclusions of law and a recital of evidence, it is not necessary to grant a new trial, provided the special verdict so presents the facts found by the jury, disregarding its conclusions of law and recital of evidence, that nothing remains for the court but to draw from the facts so found conclusions of law.

KENNEDY, J.

Eva M. Hill brought this action against the Cleveland Railway Company to recover damages for certain injuries which

she says she sustained on February 11, 1915, by reason of the alleged negligent starting of the defendant's street car while she was in the act of alighting therefrom by the conductor's express direction.

Under the authority of Section 11462 of the General Code, a special verdict in writing upon all the issues of the case was first requested by the defendant, and then requested by the plaintiff, whereupon each party, at the request of the court, prepared and submitted an outline or form of special verdict to aid the jury; and neither party objecting to the form of verdict submitted by the other, both forms were submitted to the jury, with pertinent limiting instructions to the effect that the jury was at liberty to disregard both forms, and that it was the jury's duty, if they could not concur in the finding thereunder, to prepare a verdict of their own entirely different, as they should find the facts to be from the evidence in the case, and for that purpose blank forms were submitted to the jury by the court.

The painstaking precision and exhaustiveness with which counsel for each party, Mr. Boyle for the defendant, and Mr. Payer for the plaintiff, presented in their respective forms the issuable facts claimed by them to have been established by the evidence, in the event that the jury saw fit to adopt either the one or the other, were bound indeed to simplify the task of the court and render in either event its judgment unerring by the return of such a special verdict as was contemplated by General Code, 11460, and leave the situation, as the statute expresses it, so "that nothing remains for the court but to draw from the facts found conclusions of law."

The jury did find, upon all the issues in the case, in favor of the plaintiff and adopted her form. Thus, every material fact, and all the issues were specifically found in her favor, and her damages assessed by the jury at \$17,000. The jury found "that on the 11th day of February, 1915, near 5 o'clock in the afternoon, the plaintiff, Eva M. Hill, boarded and became a passenger on a west bound Bridge avenue trailer of the defendant, then standing and receiving passengers at or near the

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shelter house on Ontario street, Public Square; that after she boarded said car the conductor of the defendant, in charge of the same, closed the door of the car in the face of a niece of the plaintiff who was within two or three feet of the car approaching the same for the purpose of becoming a passenger thereon, with the plaintiff; that thereupon the plaintiff said to said conductor, substantially, "You must let her on or me off"; whereupon the conductor opened the door, saying, in substance, "Get off then"; that the car being then in a stationary position, the plaintiff proceeded to alight from the car, and, holding onto the handlebar at the door of the car with one hand, was reaching for the ground with her right foot, when the defendant, without warning to the plaintiff, suddenly, unexpectedly, violently and negligently started said car so that, as a proximate result of that negligence, the plaintiff was violently precipitated to the pavement, striking her buttox, back and head, and falling with her feet towards Superior avenue and her head towards Euclid avenue, so that she became dazed, suffered a fracture of her coccyx and an injury to her body, mind and central organism, which has permanently incapacitated her from walking without assistance. That the plaintiff is about forty years of age, that plaintiff was wholly without fault, and that she did not attempt to get off said car while it was in motion, and that said acts and omissions of the defendant were the sole and proximate cause of said injuries of the plaintiff.

In the light of this special verdict, it is inconceivable how the court could fail to come to but one conclusion. The court is unable to perceive in the instructions of law given to the jury any error whatever; but even if all the critical contentions of counsel for the defendant were allowed, the specific issuable facts found by the jury still remain unaffected, leaving room for but one legal conclusion. A claim that the jury's special verdict is against the weight of the evidence, while set up in the motion for a new trial, is not urged either in the written brief or in the oral argument. While it is true that plaintiff's witnesses were not so numerous as defendant's witnesses, yet the candor, demeanor and character of plaintiff's witnesses and the

reasonableness of their testimony were such as to command the respect of conscientious judgment. On the other hand, the conduct of defendant's witnesses in some instances and their manner of testifying and the unreasonableness of the story told, manifestly created a bad impression, and in one instance at least, a very grave doubt exists as to the actual presence of an alleged eye-witness on the scene of the accident; and surely no weight could reasonably be expected to be added to the defense by its expert testimony, to-wit, that a woman so manifestly ill and helpless as this plaintiff was, could be cured by a prescription or suggestion of hypnotism or drunkenness, or by the excessive use of whisky, nor did the enforced subsequent modification of this contention in regard to the claimed result of either of these unique treatments impress analytical judgment. There is abundant justification in the evidence for the jury's findings, and the court fully concurs therein. Straining the application of counsel's views to the utmost, the findings of the jury in the respect that they remain admittedly immune from attack are so clear, explicit and conclusive as to resolve every material issue in favor of the plaintiff, so that legal judgment can not escape its just conclusion therefrom. Notwithstanding this view, however, careful consideration has been given to the contentions of counsel on both sides and the authorities cited.

The leading case in Ohio is 77 O. S., 360—*Rheinheimer v. Aetna Life Insurance Company*—in which case Mr. John G. White appeared for the plaintiff and Mr. W. D. McTighe for the defendant. In view of the fact that the procedure authorized by the Supreme Court of Ohio in this case was carefully followed in the instant case, it is impossible to sustain the contentions of the defendant's counsel in regard to the error of this procedure. On page 364 in the *Rheinheimer* case it appears that "counsel for defendant, before the *general charge* to the jury, requested the court to instruct the jury to return a special verdict in writing upon all the issues raised by the pleadings, but defendant's counsel declined to assist in framing the form of such verdict, and when it was prepared and submitted to

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the court by counsel for plaintiff, the defendant's counsel objected to it going to the jury, but offered no form in its place."

It is to be noted that in the instant case forms were prepared by both counsel for plaintiff, Mr. Payer, and by Mr. Boyle, for the defendant, and that each followed the form outlined on pages 364 and 365 of the Rheinheimer case, including the form of the concluding sentence on page 365, namely: "If upon the whole matter, the court shall be of the opinion that the plaintiff has established her cause of action, we then find for the plaintiff and assess her damages at the sum of sixty-two hundred dollars."

On page 368 in the Rheinheimer case, in the briefs of counsel it appears that stress was laid a number of times upon the fact that the special verdict was drafted by counsel for the plaintiff.

On page 384, in the opinion of the Supreme Court in the Rheinheimer case it appears that counsel for defendant objected to the form of verdict as prepared by counsel for plaintiff going to the jury room. The answer of the Supreme Court upon this question is found on pages 385 and 386 in the following language:

"It has always been the practice of the court to draw up and send to the jury forms of general verdicts, and the way was open in this case for counsel for defendant to have his form of special verdict sent to the jury. There was no such irregularity in the special verdict or in the manner in which it was prepared and returned as will require us to set it aside.

"In the light of this special verdict, it seems that the insurance company has not been prejudiced by the court refusing to give several of the special requests."

An examination of the record also in the Rheinheimer case discloses that a general charge to the jury was given by the trial judge; and on page 381 of the decision the Supreme Court approved both the general charge and special instructions to the jury upon questions of fact and questions of law in the following language:

"It seems to us the above special instructions given at the defendant's request, and the general charge, covered the terms of the exception in the policy, and the court sufficiently and

correctly construed the policy. The qualifying words, above noted, were contained, in whole or in part, in several of the rejected instructions, and the same comment applies to them. We will further refer to the general charge and the rejected instructions when we come to consider the special verdict returned by the jury."

In 28 C. C., 834, *Madisonville et al v. Rosser & Castoe et al*, it was held (first syllabus):

"A special verdict being requested, the court is bound to instruct the jury as to the issues in the case and the proper form of the verdict and the specific facts to be found."

The circuit court in this case quoted from 72 O. S., 586, as follows:

"In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require." * * *

On page 835 the circuit court, after this quotation from the 72 O. S., held:

"This is required when a jury returned a special verdict no less than where the verdict is general. Indeed, it would seem from Revised Statutes, 5200, which defines a special verdict, that it is even more essential that the jury shall be fully instructed as to the facts which they are required to find and upon which only the court can render judgment."

The case of *Baxter v. Railroad*, 104 Wis., 307, is exactly in point, and on page 314 Marshall, J., in the opinion of the court uses this language:

"The idea advanced by counsel for the defendant that the statutory right to a special verdict is only satisfied by questions that do not need to be considered in the light of legal principles given to the jury by the court, is contrary to the universal practice and the settled law upon the subject. Often, whether certain conduct complained of is negligence, where the evidentiary facts are all established, is a question of fact, in respect

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to which different minds may reasonably come to different conclusions. In that situation it is necessary to carefully instruct the jury regarding the standard of care necessary to the performance of the duty alleged to have been violated, leaving it to them to determine whether the alleged wrongdoer came up to the legal standard in the particular instance complained of. *The question of contributory negligence, of proximate cause, and what is reasonable are only, ordinarily, determinable by viewing evidentiary facts in the light of legal principles. The ultimate fact being only properly determinable by viewing evidentiary facts in the light of legal standards, instructions by the court in regard to such standards are necessary.* When such ultimate facts are established, the legal liability follows as a conclusion of law. At that point the jury should not be instructed. They are to find the facts, guided by the law regarding such facts, but regardless of the legal effect of their conclusions. The issues of fact raised by the pleadings are to be passed upon by the jury. The legal conclusion to be drawn from such findings is to be referred to the court with an additional conclusion by the jury, express or implied, that if the court should be of the opinion, upon the whole case, as found, that plaintiff has a good cause of action, they find for the plaintiff, otherwise for the defendant."

So that there is abundant authority in Ohio and elsewhere in favor of a general charge and explicit instructions upon the law to the jury when a special verdict upon the issues in the case is requested. Indeed, it is difficult to perceive how a jury could make a finding upon the issues without pertinent instructions, by legal definitions or otherwise, as to what those issues are.

In 18 C.C.(N.S.), p. 215, *Traction Co. v. Garnett*, on pages 220 and 221 our own circuit court said:

"On the second point (if the jury in returning a special verdict is confined by the statute to the facts), the question of negligence is, as frequently said by our Supreme Court, a mixed question of law and fact; and the form of special verdict submitted by the court to the jury in this case required them to answer specifically whether the defendant was negligent, and also whether the plaintiff was negligent. *In the charge negligence was defined as want of ordinary care, and ordinary care was defined in the familiar terms laid down by our Supreme*

Court. If the jury had been asked to say whether plaintiff and defendant respectively exercised such care in respect to the matters charged to be negligent in the pleadings, as persons of ordinary prudence are accustomed to employ under similar circumstances, such questions, together with the jury's answers thereto, would, we think, have been within the realm of fact as distinguished from conclusions of law. With the term negligence defined as the court did define it to the jury, the circumlocution was avoided and the same result follows as if the more involved phraseology had been employed in the verdict itself."

The statutes of Ohio on this subject are as follows:

The Ohio General Code, Section 11460, defines a special verdict as follows:

"A special verdict is one by which the jury finds facts only as established by the evidence; and it must so present such facts, but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law."

General Code, Section 11461: "Unless otherwise directed by the court, a jury may render either a general or a special verdict, in all actions."

General Code, Section 11462: "When requested by either party, the court shall direct the jury to give a special verdict in writing, upon any or all issues which the case presents."

In the light of these statutes and the foregoing authorities, the rationale of the opinion in the case of *The Mahoning Valley Railway Company v. Elizabeth Brunner*, decided by the Court of Appeals of the Seventh District (unreported), is founded upon a consideration of what was intended to be a special verdict in that case, for it appears in the decision of the court of appeals that:

"A special verdict was asked in this case, and both parties submitted a form of special verdict, but the jury concluded not to use either of them, and rendered one of its own making, which reads as follows: 'We, the undersigned jurors, find that the defendant company was negligent in allowing car 91 to gain too much speed before motorman applied sand and air to get the car under control.'"

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The peculiar, unsatisfactory, and inconclusive character of the finding in itself furnished trouble for the court; and the decision is not clear because it does not state the points in the trial court's charge that are deemed objectionable, nor does the case cite or review any of the authorities upon the point cursorily discussed.

Another question is raised in regard to the statement of plaintiff's counsel, Mr. Payer, in connection with the special forms prepared. While it is extremely doubtful whether counsel's statement went so far as to disclose to the jury the authorship of the particular draft, yet, even if it had, it seems to me no impropriety could be argued therefrom, for our Supreme Court, in the *Rheinheimer* case, upon page 384, does not disapprove the trial court's charge wherein it appears to have disclosed the authorship of the special verdict presented by Mr. John G. White, in the following language: "The plaintiff in this case, gentlemen of the jury, has prepared a special verdict which, upon her theory of the case, you may find if you see fit so to find."

In 18 C.C.(N.S.), page 215, where the practice is fully discussed on page 217, the court, in regard to special forms, uses this language:

"When such a verdict is required the party requesting the same usually presents such form of finding as he thinks the evidence warrants." * * *

On page 219 the court calls attention to the fact that the authorship of the special verdict was disclosed, and says:

"The alleged error in thus disclosing the origin of the questions in connection with the court's draft of special verdict is, in our opinion, without foundation."

And on page 220 the circuit court concludes:

"The impracticability of formulating a special verdict in narrative form in this case, in view of the complexity of the issues; *the practice which the defendant had already sought to establish by drafting its request for a special verdict in the same*

manner; and its failure to withdraw its request for a special verdict; in the turn which the case finally took before submission to the jury, render it impossible for us to hold that the court committed an error in the matter of practice which we have just discussed."

Before analyzing the Indiana authorities, it is to be noted that the state of Indiana, by an act of 1897 (now incorporated in Section 572), repealed its Sections 335 and 336 authorizing the rendition of a special verdict. The law of Indiana today and ever since 1897 does not authorize a special verdict, but does authorize a general verdict with special findings of fact. This repeal seems to have been due to the contention that seems to have grown up in the practice of failing to distinguish between special findings of fact and special verdicts on all issues raised by the pleadings. Indeed it appears, upon reading many of the Indiana authorities, that interrogatories submitted and answered by special findings of the juries were frequently characterized as *special verdicts*. Our own courts in Ohio have clearly pointed out the distinction between a special verdict upon all the issues in a case and the special findings of fact, which, by the express provision of our Ohio statute, are had upon questions submitted *in case a general verdict* is rendered.

In 66 O. S., 400, *Gale v. Priddy*, the distinction was clearly pointed out. First syllabus:

"1. A request that the court will direct the jury to render a special verdict in writing, upon any or all of the issues in the case, is not a request to instruct the jury that if they find a general verdict, they shall find specially upon particular questions of fact, as provided in Revised Statutes, Section 5201."

And on pages 403 and 404 in that case our Supreme Court used this language:

"It does not appear that the court was requested to instruct the jury 'to find specially upon particular questions of fact,' although questions seem to have been prepared and submitted to the court for the purpose of procuring such a special finding. Instead of such a request, the record shows that the defend-

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ant requested the court 'to direct the jury to give a special verdict in writing upon certain issues,' which is a very different thing. It does not appear that a special verdict or any 'issues' was prepared and submitted as is the general and proper practice in such cases. 22 Ency. Pl. & Pr., 993; but it does appear that certain 'particular questions of fact' were prepared, which counsel doubtless desired to have answered by the jury. A 'particular question of fact' (Section 5201, Revised Statutes) is something different from, and less than, an 'Issue'; and the object of the statute is that these special findings, if inconsistent with the general verdict, may control it."

105 Indiana, 162, *Connor v. Citizens Street Railway Company*, cited by defendant here, upon reading really appears to be a case decided in favor of the injured party, and the court in its decision uses this significant language: "Eliminating the unauthorized conclusions drawn by the jury, we proceed to the consideration of the facts properly returned in the special verdict. Upon the facts so returned, we think it clearly appears that the defendant was guilty of negligence, and that the plaintiff was without contributory fault."

This was a case in which the special verdict was unfortunately worded, and while finding in one sentence that the plaintiff was ordinarily prudent, found that the injury was caused mostly by the defendant. The special verdict was as follows:

"12th. That the conduct of plaintiff on the occasion of the injury was ordinarily prudent and cautious under the circumstances, and that he did not wholly contribute to his said injury by any fault or negligence on his part, but that said injury was caused mostly by the agent of the defendant, the driver of said car."

In 98 Indiana, 186 to 193, the objection of the court seems to have been that it could not be decided "as a matter of law that the bare fact of backing into another train constitutes negligence." And it was held:

"In our opinion, an act, not in itself wrongful and negligent, can not, *in the absence of fact or circumstances giving it that character*, be declared to constitute actionable negligence."

So that, upon careful analysis of Indiana authorities cited, it is found that analogy to the present case is lost. There are, however, authorities to be found in Indiana that seem to have some bearing.

In 110 Indiana, 251, *Woolen v. Wire*, it was held:

"Where a special verdict is demanded, instructions beyond those respecting such a verdict and usual rules concerning the credibility of witnesses are not necessary; *and if unnecessary instructions are given*, available error can not be predicated upon them."

In 101 Indiana, 582, *Indianapolis et al v. Bush*, it was held:

"It is well settled that it is the office of a special verdict to find the facts, and not the evidence or conclusions of law. (98 Ind., 186.) And so, too, the verdict should be limited to the case as made by the pleadings, and should find all the facts proven under the issues; *but it does not follow that if a special verdict should contain evidence, conclusions of law, fail to find facts proven, and find facts without the issue, a motion for a venire de novo must be sustained.*

"If a special verdict includes findings of evidence, conclusions of law, and matters without the issues, such findings will be disregarded in the determination and rendition of judgment.

"If stripped of these matters, the verdict is yet sufficient to lead to and support a judgment either way under the issues as made by the pleadings, a motion for *venire de novo* will be overruled. Such a motion will not be sustained except where there is some defect, uncertainty or ambiguity upon the face of the verdict, rendering it so defective that judgment can not be rendered upon it."

In 110 Indiana, 18, *L. N. A. & C. Railway Co. v. Frawley*, statements by a jury in a special verdict of conclusions of law will be disregarded by the court in passing upon the facts properly found.

And in 116 Indiana, 566, *Railway Company v. Buck*, it was held:

"It may be conceded that there are some merely evidentiary facts found in the special verdict, and that it also embraces

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many statements which are essentially conclusions of law. Notwithstanding all this, it seems clear to us that stripped of all these, the verdict is yet sufficient to lead up to and support the judgment, and that the motion can not be successfully urged on that account."

The verdict in this case is not large in view of the serious injury sustained; and no argument, either in the written brief or orally, is made by counsel that the verdict is too large. Substantial justice has been done in the rendition of the verdict, and it also so presents the facts of the case that nothing remains for the court but to draw from the facts found by the jury conclusions of law, and these conclusions are:

That the plaintiff, without fault on her part, was injured by the culpable negligence of the defendant as charged in the petition, and damaged to the extent of \$17,000, and is entitled to recover said amount from the defendant.

The motion for a new trial is therefore overruled, and judgment is rendered in favor of the plaintiff and against the defendant for \$17,000 and her costs. Judgment is also rendered against the defendant for its costs.

APPLICATION OF THE DOCTRINE OF ATTRACTIVE NUISANCE.

Common Pleas Court of Hamilton County.

HAROLD ROSE, AN INFANT, ETC., v. JOSEPH HEBENSTREIT.*

Decided, October Term, 1916.

Attractive Nuisance—Child Injured While Meddling With a Pulley—Used by House-Movers and Left in the Street—No Liability on the Part of the Contractor.

A contractor, engaged in moving a house, is not liable in damages for injury to a child who got his hand caught in a pulley which had been left in the street.

Darby & Benedict, for the motion.

W. H. Rucker and Thomas Usher, contra.

*Affirmed, *Rose v. Hebenstreit*, 27 C.C.(N.S.), 516.

MAY, J.

Opinion sustaining motion for a new trial.

The plaintiff, an infant of five years of age, sued the defendant for damages sustained by having his right hand caught in a pulley and four fingers lacerated, which pulley was erected by the defendant at the corner of Ashland and Highland avenues in the city of Norwood, under permit of that city, for the purpose of moving a house.

The principal ground of negligence relied on was that the pulley was a dangerous instrument and of such a character as to be attractive to children, and that it was being used in the street without a proper guard being placed by the defendant to warn children from approaching it and playing with it. The jury returned a verdict of \$3,200, and the defendant moves for a new trial because the verdict is not sustained by sufficient evidence, is contrary to law, and that the trial court erred in not directing a verdict for the defendant at the close of the plaintiff's evidence, which motion was again renewed at the close of all the evidence in the case.

I am of the opinion that the verdict is so manifestly against the weight of the evidence that a new trial should be granted.

The right of the plaintiff to recover at all is based upon the doctrine of attractive nuisance. In this state, under the decision of *Railroad v. Harvey*, and *Swarts v. Akron Water Works Company*, 77 Ohio St., 235, if the plaintiff had been a trespasser there could have been no recovery. The question remains an open one in this state, whether there can be any recovery where the injury is due to an attractive nuisance, although the plaintiff is not a trespasser. My own opinion is that the courts of last resort of the state, if the question is fairly presented, will extend the doctrine of the Harvey and Swarts cases, but, as stated above, inasmuch as they had not yet done so, I felt bound under the Gibbs case to submit to the jury the questions involved, namely, whether the instrument used by the defendant, an ordinary pulley with wire cable turned by horses, was a dangerous instrument; whether it was attractive to children; whether the neighborhood was one much frequented by children,

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which fact the defendant knew, or in the exercise of ordinary care should have known; and, furthermore, whether the defendant, acting as an ordinarily prudent man would have acted under the circumstances of the case, should have anticipated that children would be attracted to the pulley and hurt.

Very little assistance can be had by examining the cases in other jurisdictions. Since the decision in the Harvey case, many cases have been decided by various courts in this country, but in the jurisdiction where the turn-table cases is law the tendency seems to be to restrict the doctrine to instruments that are dangerous, and of themselves attractive to children. I have been able to find only one case where the injury was caused by the use of a pulley, the case of *Kelley v. Wisconsin Railway Company*, 152 Wis., 328; but Wisconsin is a state which has adopted the doctrine of the turn-table cases. As opposed to this case is the case of *Fitzger v. Rogers*, 68 N. Y. Sup., 946, where recovery was denied in the case where injury was caused by a child playing with a pulley.

I am of the opinion from the evidence in this case that the instrument used, the ordinary pulley with cable operated by horses, is not a dangerous instrument, or such as to attract children to play with it. I am also of the opinion from the evidence in this case, that a man of ordinary care and prudence, moving a house by means of a pulley in the neighborhood in which this house was being moved, would not have anticipated that children frequented the neighborhood or would be attracted to this instrument.

The language of a recent Kentucky case has some bearing upon the instant case, *Coon v. Kentucky & Indiana Terminal Railway Company*, 163 Ky., 223 (February, 1915). In that case a boy, who was injured by falling off of a wall erected by a railroad company on the public streets, was denied recovery. In affirming the decision of the trial court in sustaining a demurrer to the petition, the Court of Appeals of Kentucky, one of the states which recognizes the turn-table doctrine, says:

“The only sense in which it (retaining wall) could be said to be dangerous is that it was easy to climb, and easy to fall

from; but for that matter so is every tree, every pole, every fence, every ladder, every railing or set of steps that the owner may have about his premises. It is charged in the petition that defendant was negligent in not constructing the protecting wall in such a way that it could not be climbed. It is suggested that spikes could have been placed on it.

"Manifestly, if this had been done, and plaintiff had been injured, there would have been greater reason for holding the defendant liable. It is also suggested that a fence or a guard-rail might have been constructed at the lower point of the wall. As this would have rendered access to the wall a little more difficult, the natural result would have been to increase the number of climbers, and not only add to their danger by furnishing them something else to fall from, but to impose upon the defendant the further duty of also guarding and protecting the additional guard-rail or fence. In our opinion, the retaining wall in question was not such a dangerous instrumentality or thing as to impose on the defendant any liability for its original construction or its failure to construct barriers to prevent boys from climbing on it."

So, in the case at bar, it was suggested in argument that the defendant should have kept a man at the pulley to warn children away from it, or in the absence of such a guard, have built a fence or railing around it, or protected the pulley in some way to prevent a young child from putting his hands in it. The reasoning of the Kentucky court is applicable to this argument.

I am now of the opinion that I committed error in not directing a verdict for the defendant at the conclusion either of the plaintiff's case, or at the conclusion of all the evidence in the case. Had I done this, then the question could have been squarely raised in the upper courts as to any liability on the part of the defendant. Unfortunately, in our practice this question can not be settled finally until there is another trial, and this state of facts was brought about because I felt bound by *Gibbs v. Village of Girard*, 88 Ohio St., 34, which has not yet been overruled by the Supreme Court.

An entry may be drawn in this case granting the motion for a new trial on two grounds, to-wit, that the verdict is manifestly against the weight of the evidence and is contrary to law

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FEES TO ATTORNEYS IN ACTIONS FOR ALIMONY SETTLED WITHOUT THEIR KNOWLEDGE.

Court of Common Pleas of Hamilton County.

MADGE MAY STEWART v. WOODFORD T. STEWART.

Decided, December, 1917.

*Divorce and Alimony—No General Equitable Jurisdiction in Ohio—
And no Statutory Authority for an Order for Payment of Counsel
Fees—In an Action for Alimony Settled Without Assistance from
Counsel.*

General equity powers are not conferred upon Ohio courts in divorce and alimony matters, and in the absence of statutory authority an application by counsel for a wife for attorneys' fees and other expenses, to be made a lien upon the property of the husband in an action by the wife for alimony, which was settled out of court without the knowledge of her counsel, must be denied.

Black, Swing & Black, for the application for allowance of fees.

Harmon, Colston, Goldsmith & Hoadly, contra.

HOFFMAN (Chas. W.), J.

On October 1, 1917, the plaintiff in this cause filed a petition against the defendant praying for alimony and the subjection of certain property mentioned in the petition to the payment of whatever alimony might be allowed. An injunction was issued restraining the defendant from disposing of his property. Service on the defendant was by publication. No motion for alimony *pendente lite* or for expenses of the suit was filed by the plaintiff.

On November 14th the attorneys of record for the plaintiff filed the following motion for allowance of counsel fees:

"Now comes L. C. Black and James B. Swing, attorneys of record for Madge May Stewart, plaintiff in this cause, and represent to the court that the said plaintiff and the defendant, Woodford T. Stewart, have agreed upon a settlement of the matters herein involved in this suit, between themselves, which settlement was made without the knowledge of said counsel for said plaintiff; and said counsel move the court for an order allowing them a reasonable sum to be paid by said defendant, Woodford T. Stewart, as compensation to them for their necessary and proper legal services to be paid in this cause, and that the same

be made a charge upon the real and personal property of the said defendant, Woodford T. Stewart, in the petition in this cause mentioned and described. And said counsel further move the court for an order allowing to them to be paid by the said defendant, the necessary expenditures made by them as attorneys for plaintiff in this cause, amounting to \$61.57, and that the said expenditures of money be also made a charge upon the real and personal property in the petition mentioned and described. And said counsel ask that this cause be not dismissed until such reasonable attorney's fees and expenditures have been determined and ordered to be paid by the said defendant and have been in fact paid by him."

On November 15th the following motion was filed by the defendant:

"Now comes Woodford T. Stewart and moves the court to dismiss this case, he to pay clerk and sheriff's fees and any other court costs heretofore incurred herein, said case having been settled out of court by the plaintiff and said Woodford T. Stewart."

These motions coming on for hearing the defendant in support of the motion to dismiss the action filed an affidavit of B. E. Eaton, to which affidavit was attached the agreement that the plaintiff and defendant had made in settlement of their differences. At the same time the defendant filed an order of the plaintiff to dismiss the cause, directed to the clerk of the Court of Common Pleas, Hamilton County, State of Ohio, Division of Domestic Relations, in which order it was directed that said cause be dismissed upon the payment of the court costs by the defendant, or either of them; and, further, the order contained the statement that the plaintiff waived and released the answer or answers to said suit by either or all of said defendants and directed that the property attached by virtue of said suit be released without any charge or claim or lien against it. The agreement in reference to the settlement between the parties appears to have been made on the 12th day of November, 1917. The order of the plaintiff directing the dismissal of the suit was signed on the 15th day of November, 1917.

The motion for the allowance of counsel fees, as set forth in said motion, can be granted only upon the theory that the court has general equitable jurisdiction in alimony cases. In

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some of the cases cited by the counsel for the plaintiff it appears that the courts have held that they possessed this power. In the case of *Griffin v. Griffin*, 47 N. Y., 137, in which counsel fees were allowed, it is said in the opinion that:

"This has not been done on the theory that the court of chancery of this state was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that (except in special cases hereinafter referred to) it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes; *but upon the ground of the general equitable jurisdiction of the court* and also that when our statutes conferred the jurisdiction upon the *court of chancery*, in those actions for divorce which by the English law are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it by implication the incidental powers to its proper exercise and is in conflict with our statutory regulations on the same subject. In some of the other states a different doctrine prevails."

It will be found that practically all of the other cases cited by counsel in support of the allowance of attorney fees are based upon the same principle as the above mentioned New York case.

We find that in Ohio the doctrine, that the court in alimony cases has general equity jurisdiction, does not prevail. In the case of *DeWitt v. DeWitt*, 67 O. S., 340, the Supreme Court has discussed this subject so fully and completely that it is superfluous to repeat that which is said in the opinion in this case. It is now clear that in this state the court, in suits for alimony, "does not exercise general equity jurisdiction, but is controlled by the statutes, and is authorized to exercise such power as that expressly given and such as is necessary to make effective its orders and decrees thus made," such as injunctions to the disposition of property pending the cause, and to prevent action by the defendant which might render nugatory a decree favoring the plaintiff. We must turn to the statutes to ascertain just what powers are prescribed.

It will be observed in reading the DeWitt case that it is in direct contradiction to the theory as set forth in the case of *Griffin v. Griffin*, 47 N. Y., 137, and to the principles mentioned by Mr. Nelson in his admirable work on the "Law of Divorce

and Adjustment of Property Rights." All the cases allowing fees in actions analogous to the present case recognize the principle of general equity jurisdiction in divorce and alimony matters, which is repudiated and denied by the courts of this state.

Counsel for the plaintiff further contend that such allowance of attorney fees should be made upon the principle *ex necessitate*, or that the husband is bound to provide his wife with necessities. A number of decisions are cited to sustain this contention. We find, however, that in Ohio these questions, too, have been adjudicated, and in the cases of *Dorsey v. Goodenow*, Wright's Reports, 120, and *Karsh v. Bacciocco*, 18 Circuit Court, 251, it is held that attorney fees for services rendered to the wife in a suit for divorce and alimony against her husband are not such necessities for which the husband is liable. The discussion, however, of the attorney fees being for necessities is foreign to the consideration of the present case. In this cause it is asked that the attorney fees be allowed in an alimony case, while in all the cases in which attorney fees are considered necessities are actions at law and in proceedings other than divorce or alimony cases.

The allowance of attorney fees being controlled expressly by the statute, we turn to Section 11994 of the General Code, which provides that:

"On notice to the opposite party of the time and place of the application, the court, or judge thereof in vacation, may grant alimony to either of the parties for his or her sustenance and expenses during the suit, and allowance for the support of minor children dependent upon either of them for support and not provided for by such party during the pendency of the action for divorce, or alimony alone."

There is no provision in the code for the allowance of attorney fees to a party. It has been held, however, that attorney fees are such expenses as may be allowed the plaintiff during the suit. It has further been held by all text-book writers and informally by the decisions of the various states, that attorney fees can not be made payable to the attorney, but must be incorporated in the expenses of the plaintiff and paid directly to her. The provisions of the statute are clear that the allowance of expenses during the suit are for the benefit of the party, and

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not of the counsel for the party. The decisions are comparatively uniform to the effect that, if the party is able and has the means to prosecute the suit, no expense so far as attorney fees are concerned can be allowed. In the case at bar there is no application on the part of the party for the allowance of expenses during her suit, and there being no other provision of the statute granting the power to allow attorney fees, the court is without authority to make such allowance, and not having general equity jurisdiction the same can not be allowed irrespective of the statute.

It is contended by counsel for the plaintiff that the court has the power to protect attorneys and parties from the fraudulent acts of the opposing party. There are many cases in which this is true, but such cases are not those brought by virtue of the divorce and alimony acts, which confer certain express powers, and no others. In the present case it is not claimed that the attorneys have been defrauded, other than that the plaintiff and defendant settled the case without their knowledge and consent. The court is asked to allow fees directly to the attorney for the plaintiff upon the ground that the court has inherent jurisdiction similar to that possessed by equity courts. In view of the Ohio decisions above mentioned, the court is of the opinion that it does not possess this power, and therefore the order and application for the allowance of attorney fees must be rejected. In the case of *Reynolds v. Reynolds*, 67 Cal., 176, while the court does not discuss fully the principle of equity jurisdiction, the decision supports the view herein expressed. The syllabus is as follows:

“If pending an action for divorce the parties thereto admit a condonation and ask that the action be dismissed the court should order a dismissal and thereafter the husband can not be compelled to pay the counsel fees of the wife.”

In the opinion the court further says:

“When the husband and wife forgave and were forgiven and abandoned their criminations and recriminations, the attorneys had but to gather up their briefs and retire. The court should have at once dismissed the case and made no further order in it. *McCullough v. Murphy*, 45 Ill., 258; *Newman v. Newman*, 69 Ill., 169; *Persons v. Persons*, 7 Humph., 183.

“Section 137 of the Civil Code authorizes the court to require during the pendency of the action the payment by the husband of any money necessary for the prosecution of the action. When the wife in open court admits the condonation and asks that the action be dismissed, as she no longer has an action to be prosecuted, it is not necessary that any money be paid for its prosecution.”

The court being of the opinion that it does not possess general equity powers in divorce and alimony cases, and that it must strictly follow the statute in reference to the allowance of attorney fees, and that the statute allowing alimony does not include attorney fees, such as are requested by the attorneys in the present contention, the order for the allowance of attorney fees is denied, and the motion filed by the defendant for dismissal is granted. Entries may be prepared accordingly.

STATUS OF A DEAL BETWEEN ATTORNEY AND CLIENT.

Common Pleas Court of Brown County.

EDWARD A. MECHLING V. AUGUST BUETTGER ET AL.

Decided, October, 1917.

Attorney and Client—Presumption as to Validity of Dealings Between—Purchase of Rights of Expectant Heirs and Reversioners—Burden on Attorney to Show Adequacy of Price Paid—Rights Coupled With Liability Not Assignable.

1. The presumption always arises against the validity of a purchase or sale between client and attorney during the existence of the relation.
2. The business of attorneys making loans on and purchasing interests of expectant heirs and reversioners, while not presumptively fraudulent, will be viewed by the court with the strictest scrutiny.
3. In case of sale by client to an attorney, while the relation of attorney and client exists and in event of a suit in equity to set such sale aside on the ground of fraud, the client is not required to show that the price paid was inadequate. The burden is upon the attorney to show that it was adequate.
4. If the rights arising out of a contract are coupled with a liability thereunder, they can not be assigned.

F. O. Campe, of Chicago, Ill., and *Young & Barnes*, of Georgetown, Ohio, for plaintiff.

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Mechling v. Buettger et al.

W. P. Rogers and George Harding, of Cincinnati, Ohio, and *B. E. Campbell*, of Georgetown, Ohio, for Emma B. Rishforth and Noble Rishforth.

STEPHENSON, J.

This is an action brought by Edward A. Mechling to quiet title to in-lot No. 25 in the town of Russellville, Brown county, Ohio, and two tracts of farm lands situate in said county, consisting of about 166 acres.

It appears from the evidence in this case than on December 8, 1903, Thomas Rishforth was owner of the real estate in controversy; that on said date he made and executed his last will and testament; that on March 10, 1904, he died and on March 16, 1904, his will was admitted to probate and record in Brown county, Ohio; that said will was not contested and is in full force and effect.

By the terms of said will, the real estate in question herein was devised to Sarah Rishforth, wife, for life and at her death to Noble Rishforth and Royal Rishforth, and their heirs.

The will further provided that should any of said real estate be sold for taxes after the death of Sarah Rishforth, the whole interest devised should go to the probate judge of Brown county, Ohio, in trust for the use and benefit of Ash Ridge Cemetery.

Said will further provided that should Noble Rishforth or Royal Rishforth sell any part of said lands until twenty years after the death of Sarah Rishforth, they should forfeit their estate.

About August, 1910, F. O. Campe, an attorney at law, and others were conducting a business at Room 422-24 Ashland Block, Chicago, Ill., known as "The Probate Investment Co.," which concern dealt in estates of expectant heirs and revisioners and advertised such business in the Chicago papers. Emma B. Rishforth, mother of Noble and Royal Rishforth, at that time living in Denver, Colorado, saw the advertisement of the Probate Investment Co. in one of the papers, and in company of Noble Rishforth went to Chicago and made application to F. O. Campe for a loan upon the interest of himself and brother in the real estate in question and such negotiations were had that on the 22d day of September, 1910, a contract was entered into and

an ostensible loan of \$2,000 was made by Adam Buettger to Noble Rishforth and Royal Rishforth, which loan was secured by mortgage on the realty described in the petition herein.

This contract is in writing and in evidence in this suit, and by its terms F. O. Campe was to prosecute a suit in equity in the courts of Brown county, Ohio, to construe the will of Thomas Rishforth, deceased, presumably to get an adjudication of a court of competent jurisdiction declaring the restrictions against alienation contained in said will to be void, and the difference between the amount received by the Rishforths and the amount to be loaned by Buettger would represent the amount to be received by Campe for prosecuting such suit and paying the expense thereof.

The contract further provided that Noble Rishforth and Royal Rishforth should deed Campe the undivided one-third share of said real estate, and that in the event it became necessary for Buettger to foreclose his mortgage he should first exhaust the one-third interest deeded to Campe.

It was further provided that in order to present the question involved in the construction of the will of Thomas Rishforth, deceased, the grandsons and devisees would convey one to the other; that not later than six months after the death of Sarah Rishforth, life tenant, said lands would be sold at a price to be agreed upon by said parties, at which time the mortgage debt to Buettger became due and payable.

On September 12, 1917, Royal Rishforth made a deed for his interest in said real estate to Noble Rishforth and this deed was recorded March 30, 1917. This deed was retained by Emma B. Rishforth or the sons.

On September 22, 1910, the date of the contract hereinbefore referred to, Royal W. Rishforth, in compliance with the terms of said contract, executed another deed for his interest in said real estate to his brother, Noble Rishforth; this deed was retained by Campe.

On the same date Royal Rishforth and Noble Rishforth made affidavits that they had not sold, assigned or encumbered their interests in the real estate in question.

On June 13, 1910, a deed was executed by Royal and Noble Rishforth to their mother, Emma B. Rishforth, for an undi-

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vided one-third of said real estate, which deed was not recorded until March 30, 1917.

Royal Rishforth and Noble Rishforth, desiring to dispose of their remaining interests in said lands, had further negotiations through Campe and disposed of their then remaining interests in said real estate to Mechling for \$700 and executed their deed to Mechling on November 3, 1913, and at the same time Royal Rishforth and Noble Rishforth assigned all their interests under the contract of September 22, 1910, to Mechling and they then made further affidavits that they had not encumbered their interests in said real estate, except by the \$2,000 mortgage to Buettger.

On April 7, 1916, Royal Rishforth executed another deed to Mechling for his interest in said real estate.

All the deeds from Royal and Noble Rishforth to Campe and Mechling and the mortgage to Buettger were recorded prior to the recording of the deed from Royal to Noble Rishforth and prior to the recording of the deed from Royal and Noble Rishforth to Emma B. Rishforth.

On March 11, 1916, Edward A. Mechling filed suit to quiet title to the real estate in question in the Court of Common Pleas of Brown County, Ohio, against August Buettger, Noble W. Rishforth, Royal Rishforth, Jackson township, Brown county, Ohio; Adam Snyder, Lafe Wade and J. L. Watson, trustees of said township; Harry E. Parker and Harry E. Parker, as probate judge of Brown county, Ohio, and Mason Neal.

Gabriel Sullivan, upon application, was made party defendant to this suit and filed his answer and cross-petition on the — day of February, 1916.

Emma Rishforth, upon application, was made party defendant and filed her answer and cross-petition December 12, 1917.

F. O. Campe, upon application, is made a party defendant and with Mechling files an answer to the cross-petition of Noble Rishforth February 5, 1917.

All parties to the suit have pleaded to the petition, save only Mason Neal.

On March 17, 1916, Noble Rishforth and Royal Rishforth filed their answer and cross-petition in which they admit the deed from themselves to plaintiff, but say that the only consideration

was \$700 and that it was totally inadequate; that the deed was obtained by artifice and false and fraudulent misrepresentations of plaintiff and his agents to the effect that the property was run down and that \$700 was an adequate consideration. They say they were residents of Denver, Colorado, and F. O. Campe, agent of plaintiff, followed them there under guise of friendship and by switching papers and by reliance on false and fraudulent misrepresentations, they did execute and deliver said deed; that Buettger, Mechling and Campe conspired to procure said deed and swindle them out of their land; that they stand ready to put plaintiff *in statu quo*; that Buettger be required to answer setting forth his claim; that the court construe the will of Thomas Rishforth, deceased, with reference to the rights of all parties named therein; that said deed be set aside and held for naught; that plaintiff be enjoined from disposing of the real estate; that a receiver be appointed for said real estate, and for all proper relief.

This answer and cross-petition was verified by Emma B. Rishforth, mother of said answering defendants, who says she is their duly authorized representative for such purpose and conversant with all the facts.

On March 27, 1916, they file an amendment to their pleading, and say they have been damaged by reason of having to litigate this suit and will be further damaged and ask the court to make a finding as to the amount thereof and reduce any amount that may be found due plaintiff to that extent. This amendment is likewise verified by Emma B. Rishforth.

On April 11, 1916, plaintiff Mechling filed his reply to the answer and his answer to the cross-petition of Royal and Noble Rishforth and admits that their admissions are true; that his residence and business is in Chicago, Ill.; that he has agents and attorneys in his employ; that Royal and Noble Rishforth at the time of executing the deed in question lived in Denver, Colorado; that the land in question is valuable farm land and he denies all else and prays as in his petition.

On July 14, 1916, Gabriel Sullivan files his answer and cross-petition and says in effect that on the — day of February, 1916, he bought the lot in Russellville, Ohio, and paid plaintiff \$100 on the purchase price and took possession of the property and asks the court to protect his interests.

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On July 14, 1916, Royal Rishforth files a separate answer disclaiming all interest in the real estate in controversy and asks to be dismissed with his costs. This pleading is verified by Royal W. Rishforth.

On December 12, 1916, Emma B. Rishforth filed her answer and cross-petition, denying that plaintiff has any valid title to the real estate in controversy, and by way of cross-petition says she has legal title to and is seized in fee of the undivided one-third part of said real estate; that Royal Rishforth and Noble Rishforth conveyed it to her by deed on July 5, 1910; that Royal and Noble Rishforth are tenants in common with her in said lands unless plaintiff's deed is valid, and she prays an accounting of rents and profits, for a receiver and partition.

On January 10, 1917, plaintiff files his answer to the cross-petition of Emma B. Rishforth denying her title to any part of the real estate. He denies the alleged deed from her sons, Royal and Noble, to her; that if there was such a deed made it was without consideration and that it never was recorded; that his deed was delivered November 3, 1913, and that he had no knowledge of her deed and asks that her cross-petition be dismissed.

On January 24, 1917, Noble Rishforth files his separate amended answer and says he denies plaintiff owns said real estate but avers that he owns two-thirds of it and his mother, Emma B. Rishforth, owns the other one-third and he describes the source of his own title. He says Sarah Rishforth, widow of Thomas Rishforth, deceased, died on February 6, 1916; that in September, 1910, plaintiff Frank O. Campe and Martin C. Koebel were practicing law at Room 420, Ashland Block, Chicago, Ill., under name of Campe, Koebel & Mechling and also under the name of Campe's Agency, and their business was that of purchasing claims and interests of expectant heirs, reversioners, etc., and in loaning money to such parties on the security of their interests, and so advertised themselves in the daily papers of said city; that Royal Rishforth was then 27 years old and Noble Rishforth was 23 years old and neither had knowledge of real estate values; that they saw Campe's advertisement and applied to him for a loan of \$1,000, payment to be secured by mortgage on the realty in question; that Campe went to Brown county, Ohio, examined said lands and ascertained the value

thereof and on September 22, 1910, they entered into the contract hereinbefore referred to; that under said arrangement he and his brother received \$1,000 and no more. That on September 12, 1910, Royal Rishforth conveyed to him, Noble Rishforth, all his interest in said real estate and he became sole owner of all of it.

In August, 1913, Campe again viewed said real estate and bid in writing \$500 for it, later increasing the bid to \$700, which proposition was accepted by Royal Rishforth for himself and this defendant, and on November 3, 1913, the purported deed of himself and brother to plaintiff, Mechling, was executed and said sum of \$700 was paid by Campe to them and at the same time Campe procured an assignment of their interests under said contract to Mechling. That at all times Campe and Mechling were acting as their attorneys and that defendant had utmost confidence in them and believed their statements that they were paying all their interests in said lands were worth. That the total sum of money received by them from Campe was \$1,000 on September 22, 1910, and \$700 on November 3, 1913. That this defendant is willing to repay said sum of \$1,700 with interest and that the same may be made a lien on said lands, and he prays that Campe be made a party defendant; that the deed to Mechling be set aside; that Campe be declared a trustee of said real estate for him; that the court take an account for rents and profits; that partition be made and for all proper relief.

On February 5, 1917, Edward A. Mechling and Frank O. Campe filed their joint answer to the cross-petition of Noble Rishforth, and say they deny Mechling, Campe and Koebel were engaged in practicing law in September, 1910, or that they conducted Campe's Agency or were engaged in trafficking in prospective interests or that they so advertised in the papers of Chicago. They say that in September, 1910, Emma B. Rishforth applied to them for a loan of \$1,500 on her son's interest in the real estate in question; that Campe went to Brown county, Ohio; that they entered into the contract of September 22, 1910; they deny that the mortgage belongs to Campe, but say it belongs to Buettger; they deny that only \$1,000 was advanced to the Rishforths; they know nothing of the deed from Royal Rishforth to Noble Rishforth, dated September 12, 1910; they admit that

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in November, 1913, Royal and Noble Rishforth made a deed to Mechling for the real estate in question and that Campe obtained their assignment of their interest under the contract of September 22, 1910; they deny that Mechling was employed as an attorney to Campe and Buettger; they deny all misrepresentations; they say \$1,500 was paid Rishforths instead of \$1,000; that the consideration they gave for said lands at the time was fair.

On April 5, 1917, Emma B. Rishforth filed her reply to the answer of Campe and Mechling to her cross-petition, and says that the deed from Royal and Noble Rishforth to her was for consideration but so far as plaintiff is concerned it makes no difference. She admits said deed hasn't been recorded but that same was exhibited to the agent of plaintiff who read same and suggested that it be not recorded. And these are all the pleadings filed in the case that the court deems necessary to set out in this finding in determining the issues in this case.

It is not worth while to advert to the issue in this matter as between any of the parties and the township trustees and Harry E. Parker, as probate judge of Brown county, Ohio, as it is conceded that the restrictions against alienation in the will of Thomas Rishforth, deceased, are void and that Royal Rishforth and Noble Rishforth took a fee simple estate under said will.

Mason Neal does not answer or demur and the parties entitled may have a decree quieting their title as against him.

Gabriel Sullivan is out of place in this suit. Beside the facts pleaded by him do not warrant the court in granting him relief, legal or equitable, and his cross-petition will be dismissed.

The real issue is between Mechling, Buettger and Campe on the one side and Emma B. Rishforth and Noble Rishforth on the other.

Royal Rishforth disclaims and is dismissed with his costs.

The court does not agree with counsel for the Rishforths that the contract of September 22, 1910, should be set aside or that the mortgage to Buettger of the same date should be set aside.

This was simply a loan. True, the Rishforths only received \$1,000 in cash, but for the other \$1,000 Campe was to construe the will of Thomas Rishforth, deceased, in the courts of Brown county, Ohio, and pay the costs and expenses; but it is claimed by counsel that such suit was unnecessary as the will construed itself.

The court does not think the provisions of the will of Thomas Rishforth, deceased, really needed a construction, but these contracting parties concluded it did and Emma B. Rishforth in at least two of her pleadings asks a construction of said will; and as she is the real defendant in the case and was to a certain extent managing the business of the boys on and prior to September 22, 1910, she must have then concluded that said will should be construed, and she has not as yet changed her mind.

It may be insisted that Royal Rishforth and Noble Rishforth or either of them have any right under said contract, as they assigned all rights when they assigned said contract to Mechling.

This is not so. The right to have Campe have the will of Thomas Rishforth, deceased, construed and to pay the costs and expenses of such suit remained with them, notwithstanding such assignment.

It is a well settled principle of law that if the rights arising out of a contract are coupled with a liability thereunder, they can't be assigned. 4 Cyc., p. 22, and cases cited.

The real question that now confronts the court is, whether or not the deed from Royal and Noble Rishforth to Mechling of date of November 3, 1913, should be set aside?

It should not, so far as Royal Rishforth is concerned. He is still satisfied and a chancellor will not force equitable relief upon one not asking for it.

Royal Rishforth's deed will not be set aside. Should Noble's deed of same date be set aside?

Counsel for Mechling, Buettger and Campe admit that there is an umbilical cord between them that makes them one so far as this case is concerned.

The acts of Campe in and concerning this entire transaction are the acts of Mechling and Buettger.

The relation of attorney and client began when the contract of September 22, 1910, was entered into and has at all times since existed and will continue to exist until Campe has the will of Thomas Rishforth, deceased, construed.

Was the consideration of \$2,700 for this farm and town lot inadequate, and did Campe know it?

It must be borne in mind that at all times Noble Rishforth evidently did not know that he had more than an uncertain in-

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terest in the real estate in question, notwithstanding he had an absolute fee simple title to the undivided one-half of it. He had an uncertain interest; he needed money and he was willing to dispose of his interest for the best bargain he could drive upon that basis. In other words, he was in a condition to be imposed upon.

It will be borne in mind that the court is not charging Noble Rishforth with the business acumen of his mother or with her knowledge of the value of the lands in question. He was acting *sui juris* in these matters. There is no showing that he knew the value of this real estate.

The relation of attorney and client existed between him and Campe when the deed was executed, and it was not for Noble Rishforth to show that the price he obtained for his interest in said real estate was inadequate, but it was for Campe to show that it was adequate. It was up to Campe to show utmost good faith and make full disclosure. As the court views it, he did neither.

Campe as a lawyer knew that the tax valuation was not the real market value of the real estate. He knew that the price that was being paid was inadequate.

The deed from Noble Rishforth to Mechling bearing date of November 3, 1913, will be set aside but the mortgage lien of August Buettger to the extent of \$1,000 with interest as provided for in said note will be preserved in the undivided half of said lands belonging to Noble Rishforth and a lien is reserved against same for \$350 with interest from the 3d day of November, 1913, in favor of Edward A. Mechling.

The undivided one-half conveyed by Royal Rishforth to Mechling is charged with \$1,000 and interest, and \$350 in the manner as Noble Rishforth's share is charged.

When Noble Rishforth, within sixty days of the entry of this decree, tenders said \$1,000 with interest as aforesaid to August Buettger, said August Buettger shall release said mortgage of record as to Noble Rishforth's undivided one-half of said real estate, and if after such tender he shall fail for ten days to release said mortgage, this decree shall operate as such release.

When Noble Rishforth, within sixty days of the entry of this decree tenders \$350 with interest as aforesaid to Edward A.

Mechling, said Edward A. Mechling shall forthwith deliver to him a good and sufficient deed for the undivided one-half of said real estate, and if after such tender he shall fail for ten days to execute and deliver such conveyance then this decree shall operate as such conveyance.

Should Noble Rishforth fail to make such tenders within sixty days of the entry of this decree, then the court declares said sums with interest to be and remain a lien against said share of Noble Rishforth.

The court finds that Emma B. Rishforth has no title to any part of this real estate superior to the mortgage of Buettger or the deed to Mechling, but does find that she is the owner of one-third of the one-half of said real estate belonging under this decree to Noble Rishforth, subject to the aforesaid lien of Buettger for \$1,000 with interest and the lien of Mechling for \$350 with interest as aforesaid; that Noble Rishforth's share in said lands is charged with two thirds of said respective sums and Emma B. Rishforth's share with one-third.

The court finds that Edward A. Mechling is the owner in fee simple of the undivided one-half of said real estate; that Noble Rishforth is the owner of the undivided two-sixths of said real estate, subject to the liens aforesaid, and that Emma B. Rishforth is the owner of one-sixth of said real estate subject to the liens aforesaid; that the title of each, after compliance with this decree, will be quieted as against all parties to this suit.

After the release of said mortgage and delivery of said deed as above decreed or in the event of the failure of either, then immediately subsequent to ten days thereafter, partition of said premises will be ordered and the cost of this entire proceeding, together with the costs in partition, including the statutory attorney fee allowed under the rule of the Court of Common Pleas of Brown County, Ohio, to the attorneys of Emma B. Rishforth as allowed in partition, shall be paid out of the share of said real estate belonging to Edward A. Mechling.

Campe is primarily responsible for this cost, but as Campe and Mechling are one, Mechling's share must bear the burden.

Accounting for rents and profits may be had in accordance with this decree.

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**ORDINANCE PROHIBITING PROFANITY IN PUBLIC PLACES
RENDERED INVALID BY EXCESSIVE
PENALTY.**

Common Pleas Court of Ashtabula County.

WILLIAM MORRIS V. CITY OF CONNEAUT.

Decided, February 19, 1917.

Use of Profanity in Public Places—Penalty Fixed in Prohibitory Ordinance—Must Not Exceed that Prescribed by Statute for Disturbing the Peace—Affidavit Charging Profanity Need Not Set Forth the Language Used—Section 3665.

1. An affidavit charging a disturbance of the good order and quiet of a municipality by using profane language in a public place is not defective for failure to set forth the profane language claimed to have been used, particularly since the gist of the offense charged was the disturbance of the peace and the accused understood the charge and called several witnesses upon the precise proposition as to whether profane language was used.
2. The penalty for the violation of an ordinance is an inseparable part of it and, if illegal or excessive, invalidates the ordinance; hence, an ordinance, making it an offense to disturb the good order and quiet of the municipality "by using profane language" and imposing a maximum fine of \$200, is invalid in that it exceeds the maximum penalty of \$50 prescribed by Section 3665, General Code.
3. A court imposing a sentence ordinarily takes into consideration the nature of the offense committed and the maximum and minimum penalties prescribed for its violation; and a fine of \$50 imposed for violation of an ordinance prescribing a maximum penalty of \$200 would be excessive when the statute authorizing such ordinance prescribes a maximum penalty of only \$50.
4. Since Section 3665, General Code, limiting fines to \$50 as punishment for disturbing the peace and other minor offenses prescribed by Section 3664, was not repealed by 96 O. L., 20, the Municipal Code of 1902, by 99 O. L., 4, nor by 103 O. L., 168, amending Section 3664, and as Section 3665 is special and specifically applies to Section 3664 and no other, it must control as against Section 3628 prescribing punishment for violation of ordinances generally and for more serious offenses.

R. E. Mygatt, for plaintiff in error.

J. E. Helman, contra.

ROBERTS, J.

This is a proceeding in error in which the plaintiff, William Morris, plaintiff in error, seeks a reversal of a judgment of conviction rendered against him by D. S. Brace, mayor of the city of Conneaut, in which action in said mayor's court the plaintiff in error was found guilty of a violation of an ordinance of said city.

The information or affidavit upon which said action was instituted charged in substance that the plaintiff in error on or about October 25, 1916, did unlawfully disturb the good order and quiet of the city of Conneaut, Ohio, by using profane language in a public place in the aforesaid city of Conneaut, Ohio, to the annoyance of the citizens of said city; contrary to ordinance number 1271 of the ordinances of the city of Conneaut, Ohio.

The ordinance under the provisions of which this action was brought provides as follows:

"Section ne. It shall be unlawful for any person or persons to disturb the good order and quiet of the city of Conneaut, state of Ohio, with clamors and noise in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or by otherwise violating the public peace by indecent and disorderly conduct or by lewd and lascivious behavior.

"Section Two. Any person found guilty of disturbing the good order and quiet of the city in violation of the foregoing section of this ordinance shall be fined in any sum not less than five dollars (\$5) nor more than two hundred dollars (\$200) with costs of prosecution, and shall be committed to jail until such fine and costs are paid."

This ordinance was passed in attempted conformity to Section 3663, General Code, as amended 103 O. L., 168.

The plaintiff in error on conviction was fined fifty dollars in mayor's court.

The plaintiff in error avers that there is error in the record and proceedings in this case, and that the court committed error in the trial of said proceedings, in this, to-wit:

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First. The mayor erred in holding that the affidavit of complaint was sufficient.

Second. The mayor erred in overruling the motion of defendant to quash the affidavit and dismiss the proceedings.

Third. The mayor erred in overruling the motion of defendant for arrest of judgment made by defendant at the close of evidence introduced by the plaintiff below.

Fourth. The mayor erred in overruling the motion of defendant in arrest of judgment upon completion of all testimony taken in the case.

Fifth. The mayor erred in the admitting of improper testimony offered on behalf of the city of Conneaut, state of Ohio, objected to by defendant below.

Sixth. The mayor erred in the exclusion of proper and competent testimony offered by the defendant below, which was excepted to.

Seventh. The judgment and sentence of said mayor is against the law of the case and invalid.

Eighth. The judgment and sentence of said mayor is against the evidence in the case and the manifest weight thereof.

Ninth. There is no evidence whatever to sustain said judgment and sentence.

Tenth. The mayor erred in overruling the motion of defendant below, for a new trial.

Eleventh. The mayor erred in refusing to set aside the sentence of defendant upon his motion therefor.

Twelfth. That the ordinance on which the prosecution was based was unconstitutional and void, and the mayor erred in rendering judgment and sentence thereon.

Thirteenth. Other errors apparent upon inspection of the record.

It is learned from the brief of counsel for plaintiff in error that he seeks a reversal of the judgment in mayor's court primarily upon two propositions, (1) that the affidavit upon which the plaintiff in error was tried is insufficient in law; and (2) that the ordinance which the plaintiff in error is charged with violating, above quoted, is illegal.

Consideration will now be given to the first ground stated, that is, the alleged insufficiency of the affidavit. This question was properly raised in the trial court by a motion to quash the affidavit, which was overruled, and by a motion in arrest of judgment, which was also overruled.

Briefly stated, it is the contention of counsel for plaintiff in error that the affidavit is defective in that it does not set out the profane language claimed to have been used by the plaintiff in error. It will be remembered that the affidavit simply charges a disturbance of the good order and quiet of the city by using profane language.

Counsel for plaintiff in error with considerable industry has cited a large number of decisions in reported cases in this state, Supreme Court and otherwise, in support of his contention, which are in effect as quotation in brief from *Lamberton v. State*, 11 Ohio, 282, in which it is said:

"It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged; that it should set forth the facts constituting the crime so that the accused may have notice of what he is to meet, of the act done which it behooves him to controvert, so that the courts applying the law to the facts charged against him may say that a crime has been committed."

I think I am correct in saying that in each of the decisions cited by counsel for plaintiff in error the alleged defect in the indictment consisted in a failure to state with sufficient explicitness that which was the gist or gravamen of the offense sought to be charged.

In *Lamberton v. State*, *supra*, cited, the offense was resisting an officer in the execution of his office.

In *Ellars v. State*, 25 Ohio St., 385, the offense was that of obtaining property under false pretenses.

In *Mann v. State*, 47 Ohio St., 556, the offense sought to be charged was that of blackmailing.

In *Hummel v. State*, 8 N. P., 48, the offense charged was that of using obscene language in the presence of a female.

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In the case under consideration the gravamen of the action and the gist of the alleged offense is that of disturbing the good order and quiet of the city, and the use of profane language in the information merely indicates the manner in which the good order and quiet of the city was disturbed.

King v. New London, 8 N.P.(N.S.), 34, also cited, is more closely in point. This was an action for violating the public peace by indecent conduct. The affidavit did not set forth the acts committed constituting the offense, and the court held that it merely stated a conclusion of law and was defective in that it does not advise the accused of the charge upon which trial is to be had. It will be noted, however, that a charge of indecent conduct is more indefinite than in the affidavit under consideration, in which it is alleged that the good order and quiet was disturbed in a particular manner, namely, by profane language.

Where an affidavit in a criminal action is filed in an examining court of preliminary jurisdiction the preciseness and explicitness required in an indictment in a court of final jurisdiction is not necessary. It may be assumed, however, that there is no substantial difference in the law between an indictment and an information in the mayor's court. In this action it being one in which the mayor had a right to and did exercise final jurisdiction.

I am aware that numerous decisions in the past may be found in which a close and technical construction has been made concerning the necessity of stating explicitly the facts sought to be charged in an indictment, and that mere conclusions are not sufficient. In recent years, however, there is a decided tendency to disregard matters which are merely technical and which do not affect the substantial rights of a defendant or prejudice him in his defense.

It should be remembered that in this case the plaintiff in error was charged with disturbing the public peace by the use of profane language in a public place, and at a certain time, and it does not appear from the bill of exceptions that there was any doubt or misapprehension on his part concerning that with which

he was charged, or against which he might prepare his defense. The facts seem to have been fully understood and the defendant below called a considerable number of witnesses upon the precise proposition as to whether or not he did use profane language.

I desire to now cite some authorities which I believe indicate the decided and modern trend of the law in a consideration of the sufficiency of indictments in criminal actions.

In *Stoughton v. State*, 2 Ohio St., 562, it is said:

"Unreasonable strictness ought not to be required and where an indictment clearly charges a crime, and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained.

"The highest degree of certainty is not required; certainty to a common intent is sufficient, and no rule ought to prevail which would only serve to shield the guilty instead of protecting the innocent."

In the case of *State v. Zurhorst*, 75 Ohio St., 232, the indictment charged the accused with having unlawfully at a certain time in his possession a certain number of copies of a certain article of an indecent and immoral nature, the contents of the article not being stated in the indictment. *Held*: That the indictment was sufficient. In the opinion of the court in this case it is said on page 239:

"It is well enough and it is good practice, that an indictment under this statute should with reasonable certainty apprise the accused of what he is called upon to meet—such degree of certainty as will afford him protection in the exercise of his legal rights in making a defense, and also furnish a record of conviction or acquittal, that could be interposed if indicted the second time for the same offense. But we doubt whether the strict rules of pleading at common law in cases of criminal libel should be enforced in a prosecution under this statute."

In *State v. Groves*, 80 Ohio St., 351, the second paragraph of the syllabus reads as follows:

"An indictment framed under Section 6835, R. S., as amended and passed April 9, 1908, which, in all other respects, sufficiently describes and charges an attempt to break and enter an inhabited

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dwelling-house with intent to commit a felony, will not be held bad for omission to designate and define the particular felony intended to be committed."

Reference is made to the reasoning found in the opinion in this case, which is peculiarly appropriate to a consideration of the case at bar.

In the case of *State v. Toney*, 81 Ohio St., 130, the second paragraph of the syllabus reads as follows:

"An indictment which apprises the party charged of the charge against him so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime and the person charged and is not void for uncertainty."

See also *State v. Murray*, 82 Ohio St., 305; *State v. Henkel*, 11 N.P.(N.S.), 97.

Section 13581, General Code, providing what defects in an indictment are not fatal, says:

"An indictment is not invalid and the trial, judgment, or other proceeding stayed, arrested or affected, * * * for want of averment of matter not necessary to be proved, or for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

This statutory provision would seem to be a sufficient answer to the claim of plaintiff in error that the affidavit is insufficient.

Section 13390, General Code, provides:

"Whoever, being over fourteen years of age, profanely curses or swears by the name of God, Jesus Christ, or the Holy Ghost, under complaint made within ten days thereafter, shall be fined not more than one dollar for each offense."

Under this section where the precise offense is profanely swearing, there would be greater necessity for the application of the rule contended for by counsel in brief, for the reason that the profane swearing is the gravamen of the offense. While, as has been said, under the affidavit in the instant case, the offense

consists in a disturbance of the public peace, and swearing was simply the manner of its accomplishment.

The rule is well settled that if the language of the statute is of such a character as to inform the accused fully and distinctly of the facts upon which the state relies, it is sufficient to allege the offense in the language of the statute. And it being wholly apparent in the language of the statute (Section 13581), the defects did not prejudice the substantial rights of the defendant upon the merits, the affidavit is found to be sufficient, and the objections made thereto not well founded.

Consideration will now be given to the second contention of counsel for plaintiff in error, that the ordinance under which defendant below was convicted is illegal, and this is claimed to be so by reason of the penalty prescribed as a punishment for a violation of the ordinance. Section 2 of the ordinance reads:

"Any person found guilty of disturbing the good order and quiet of the city, in violation of the foregoing Sec. 1 of this ordinance, shall be fined in any sum not less than five dollars nor more than two hundred dollars, with costs of prosecution, and shall be committed to jail until such fine and costs are paid."

As has been before stated, this ordinance is drawn under the provisions of Section 3664, G. C.:

"To provide for the punishment of persons disturbing the good order and quiet of the corporation * * * by using profane language." The following section, namely 3665, reads:

"Such punishment may be by imposing and collecting fines or by imprisonment in the proper jail or work house at hard labor, or both, at the discretion of the court, but no such person shall be fined for a single offense to exceed fifty dollars."

No doubt can be entertained, and in fact it is conceded, that the ordinance is based upon Section 3664, and that the limit of punishment so far as fine is concerned, as provided by Section 3665, is fifty dollars, while the ordinance provided for a fine of not exceeding two hundred dollars. This amount of fine is sought to be justified by counsel for the city by the provisions of Section 3628, which is found in the enumeration of the powers of municipalities, and among them is found Section 3628, as follows:

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“To make the violation of ordinances a misdemeanor and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars.”

There is thus an apparent conflict as to the amount of fine authorized to be provided for by ordinance.

Section 3658, G. C., in the enumeration of powers, authorizes municipalities “To prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages, and to preserve the peace and good order and to protect the property of the corporation and its inhabitants.” This was Section 1692 R. S. and Section 3664, under which the ordinance in question was drawn, was Section 2108, R. S.

In the case of *Wellsville v. O'Connor*, 1 C.C.(N.S.), 253, decided by the circuit court of this district, it is said in the second paragraph of the syllabus:

“The general power ‘to preserve the peace and good order,’ conferred upon municipal corporations by Section 1692, R. S., is limited, and the manner of its exercise definitely prescribed by Section 2108, R. S., and the authority of municipalities to pass ordinances concerning the public peace must be found, if at all, in the latter section.”

Section 1692, R. S., is broader and more general in its terms than Section 2108, R. S., which latter section is limited in its application to disturbing the good order and quiet of the corporation.

The evident intent of the Legislature in Section 3628, G. C., providing for a fine not exceeding five hundred dollars, to apply generally to Section 3658, G. C., formerly Section 1692, R. S., which as has been said is broader in its terms and may include more serious offenses, and the purpose of Section 3665, G. C., was to limit a fine of fifty dollars for the minor offenses consisting of disturbing the good order and quiet of the corporation. It was not the intention of the Legislature that the section providing for the higher penalty should, by implication or otherwise, repeal the latter. Section 3665, G. C., was not repealed by the act of October 22, 1902 (96 O. L., 20), which was a codification of municipal legislation. The act of April 20, 1904

(99 O. L., 4), amending certain sections of the municipal code enacts Section 3628, G. C. as Section 700, but makes no reference to Section 3665. Section 3664, G. C., was amended in 103 O. L., 168. The following section providing for the penalty, however, was not disturbed. This is also indicative of the legislative intent to preserve as well Section 3665 for the enforcement of the preceding section.

If it were to be conceded that we have two sections providing different penalties for the law authorizing the enactment of this ordinance, then the section which is special and applies particularly to Section 3665, and to no other section, must control as against a general provision for fines in other terms, and it must be concluded that the special section creates an exception to the application of the general one and the special must control. The conclusion is therefore reached that the city of Conneaut was authorized to impose as a penalty for the violation of the ordinance in question a sum not exceeding fifty dollars, and the penalty which was provided, namely, not exceeding two hundred dollars, was unauthorized and illegal.

The fine complained of, however, was only fifty dollars, not in excess of the sum which the city had a right to provide as the maximum penalty for a violation of the ordinance. The important and the controlling proposition now for determination is: Does the illegal and excessive penalty provided for in the ordinance make the ordinance itself illegal and void, or simply limit the infliction of the penalty to the amount which might properly be imposed? Some authorities upon this proposition will now be cited.

"Municipal corporations in their public capacity possess such powers, and such only, as are expressly granted by statute, and such as may be implied as essential to carry into effect those which are expressly granted." *Ravenna v. Pennsylvania Co.*, 45 Ohio St., 118.

"Municipal corporations in Ohio have only such police power as is expressly granted or clearly implied." *Townsend v. Circleville*, 78 Ohio St., 122.

Approaching more closely to the precise question involved as to the effect upon an ordinance, which is in part illegal, the

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general rule is stated in *Detroit v. Railway*, 95 Mich., 456, as follows

“When a municipal ordinance is good in part and bad in part, it is only necessary, in order to maintain the ordinance, that the valid and invalid parts be so distinct and independent that the invalid may be eliminated and what remains contain all the essentials of a complete ordinance.”

Attention is now directed to the case of *Landis v. Vineland*, 54 N. J. Law, 75. The ordinance in question provided as a penalty a fine of not less than three dollars nor more than ten dollars for each offense. The law providing for the ordinance authorized imprisonment not exceeding ten days, or a fine not exceeding twenty dollars, or both. In the opinion by the court it is said:

“By the charter the penalty may be any sum not exceeding twenty dollars, in the discretion of the mayor. By the ordinance it may not be less than three nor more than ten dollars. Both of these provisions can not stand, and consequently the penalty prescribed by the ordinance must fall, under the general principle that municipal ordinances inconsistent with the charter are void. It remains to consider the effect of this conclusion upon the residue of the ordinance which, in substance, declares what shall be an offense. The principle to be applied is that if part of a law be void, other essential and connected parts are also void, but where that part which is bad is independent and not essentially connected with the remainder, the latter will stand. In applying this principle the question to be decided is whether it is clear that if the void part of the enactment be obliterated the residue will still express that which the legislator intended to become law, and which is enforceable as law. In the present case the mayor and council ordained that certain acts should be visited with a fine not exceeding ten dollars. Is it clear that they intended that such acts might be visited with a fine of twenty dollars? Is it clear that if they had understood that the penalty might amount to twenty dollars they would have defined the prohibited conduct in the same terms? We think not. The misconduct and the penalty denounced by them must have been connected in their minds as essential parts of a single law. If the court should substitute the statutory penalty for that fixed in the ordinance a law would be framed which the

legislative power has not expressed its intention to enact. The ordinance under which the prosecutrix was convicted is wholly void and her conviction must therefore be reversed."

In *Burlington v. Kellar*, 18 Ia., 59, 65, it is said:

"It is a well settled rule that the authority conferred upon municipal corporations is to be strictly construed and must be closely pursued."

Sedgwick, Statutory and Constitutional Law, 446:

"Or, as the rule was stated by the Court of Appeals of New York, 'The ordinance of a municipal corporation must conform strictly to the provision of the statute giving power to pass the ordinance, or its proceeding will be void.'"

In *State v. Bright*, 38 La. Ann., 1, the syllabus reads:

"A city has no power to punish disobedience of its ordinances by fine, imprisonment or other penalty, unless it is expressly granted by its charter."

Again, it is said in the opinion:

"If it be true, as claimed, that the city has no right to enforce an ordinance to accomplish that object by fine, and in default of payment, by imprisonment, it follows that the ordinance in this case would be clearly unwarranted and illegal in that respect. This would suffice to render it inoperative and to relieve the defendant from the effect of the judgment from which he has appealed."

"In regard to Section 9 of the ordinance the punishment provided for the unlawful selling of intoxicating liquors as fixed by said section is not authorized; that is, the provisions of the statute do not authorize imprisonment as a punishment for the violation of the ordinances except for non-payment of road tax. This leaves no provision of the ordinance under which the petitioner can be prosecuted upon any count of the complaint. The petitioner is therefore discharged." *In re Semple* (Kans.), 62 Pac., 534.

A case decided in the Supreme Court of California in *Strause v. Police Court*, 85 Cal., 49, is illuminating upon the

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question as to what part of an ordinance may be eliminated therefrom as void and leave the balance of the ordinance operative. The ordinance in question provided for the issuing of liquor licenses and for the payment of a license fee, and declared a violation of the ordinance a misdemeanor punishable by a fine of not more than one thousand dollars, or imprisonment for not more than six months, or both. The penal code of California, applicable to this proposition, prescribes a punishment of imprisonment of not more than six months, or a fine not exceeding five hundred dollars, or both. It was held that though the punishment provided by the ordinance conflicted with that prescribed by the statute, this portion of the ordinance could be rejected and that providing for the license could stand, as they were not dependent upon each other.

Thus, it will be seen that where an ordinance provides for two separate and distinct matters, as in this ordinance the issuing of a liquor license and a fee therefor, and a provision for a violation thereof, and a penalty for the violation, an excessive fine, unwarrantedly provided by the ordinance, rendered the penal part of the ordinance void, but that which provided for the issuing of the license and the payment of the license fee, being separate and distinct from the other part, would still be operative.

In the case of *State, ex rel Dubuque, v. Babcock*, 112 La., 250, an ordinance was held invalid which provided such penalty that it might be imposed in excess of the authority granted by the Legislature.

In the case of *Shreveport v. Draiss & Co.*, 111 La., 511, it was held that the council did not have power to pass an ordinance imposing a penalty in excess of that provided by law.

The authorities seem to settle the question that the penalty for violation of an ordinance is an inseparable part of it, and that if the penalty be illegal or excessive, the whole ordinance is void, and that such conditions do not come within the other rule that part of an ordinance may stand if it be independent of another part which is illegal.

Another reason which may be suggested in this connection is that a court imposing a sentence ordinarily takes into con-

sideration two things, the nature of the offense and the maximum and minimum penalty provided, and fixes the amount of fine at such sum as the nature of the offense seems to merit considering the highest and lowest penalty. Presumably the mayor's court in the case at bar, imposed a fine of fifty dollars understanding that for a more aggravated offense he would have a right to impose a fine which would be just, to the amount of two hundred dollars, when, as a matter of fact, the court was imposing a fine to the limit of its jurisdiction as permitted by law. This proposition becomes more pertinent when we remember that if the defendant below had been prosecuted directly for profane swearing, under Section 13390, he could be fined only one dollar for each offense, but by alleging the profanity in connection with the somewhat mythical disturbance of the public peace the fine is made fifty dollars. That the court was presumably misled in his determination of the amount of the fine by the illegal provision of the ordinance appears more probable when it is remembered that the offense charged was one constantly and generally committed and very rarely punished. This court is irresistibly led to the conclusion that the ordinance, for the reasoning herein indulged in, and by the authorities cited, is illegal and void by reason of the unauthorized severity of the penalty. The action is therefore reversed and the plaintiff in error discharged.

This disposition of the case makes it unnecessary to consider the future questions raised by counsel for the plaintiff in error, namely, that the conviction was against the weight of the evidence and the ordinance is unconstitutional.

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Kibler, Admr., v. Blair et al.

**DETERMINATION AS TO WHETHER PROPERTY IS
ANCESTRAL.'**

Common Pleas Court of Licking County.

EDWARD KIBLER V. VIVIA BLAIR ET AL.

Decided, January Term, 1917.

Wills—Devise of Real Property to Son—Made Subject to Payment by the Son of a Legacy to Daughter—Property Not Acquired by Purchase by Reason of Said Payment.

The character of property devised is not changed from ancestral to non-ancestral by the fact that the devisee is charged with payment of a legacy to one named in the will and the property is made subject to a lien securing said payment.

Kibler & Kibler, on behalf of plaintiff.
Fitzgibbon, Montgomery & Black, contra.

JEWELL, J. (orally).

This is an action brought by Edward Kibler, as administrator *de bonis non* of the estate of William Glenny Wallace, deceased, asking for the construction of the will of William Glenny Wallace. It seems that Henry Wallace, father of William Glenny Wallace, died many years ago. Henry Wallace left a will, and by item 3 of his will he devised to the son, William Glenny Wallace, his farm. He had two children—William Glenny Wallace and Mrs. Margaret Reynolds. He devised by item 3 this property to his son, and in item 4 provided that the son should pay \$5,000 to his daughter, Mrs. Reynolds. William Glenny Wallace lived many years and died intestate leaving Jemima E. Wallace, his widow. The property of William Glenny Wallace was sold to pay debts, and the administrator has in his hands something like \$3,000. The widow claims that the property belongs to her. The children of his sister—his sister having died—contend that the widow only has a life estate in the farm, and that at the death of the widow the fund passes to the children of Mrs. Reynolds, the sister of William Glenny Wallace. So

it goes back to the nature of the estate held by the son, William Glenny Wallace.

It is contended by the widow that a devise of this farm to the son, with a lien upon it of \$5,000, made the farm come by purchase; and if it came by purchase of course the widow takes absolutely the fee. If it is treated as ancestral property and came by deed of gift, or devised by will, then the widow has only a life estate upon the fund, and it must be treated as a trust fund and pass to the children of the deceased sister.

The question in this state is a new one. We have drafted, ourselves, many wills of this nature, and never thought of this question coming up before; that is, as to whether or not a devise of real estate in a will to a child, followed by a further gift to another child, and making the gift a lien upon the property, changed the character of that property from ancestral to non-ancestral property.

This will gives to the son this property, and by a following item provides that he shall pay to his sister \$5,000 and makes it a lien upon the property.

I am satisfied, after giving this matter some consideration, that the gift to the daughter of \$5,000 did not change the character of the gift to the son; but it merely diminishes the value of the gift by \$5,000; that is, the nature of the gift remains the same. The value of the gift is lessened by \$5,000. No act whatever was necessary upon the part of the son to take this property. He became the owner of the property upon the death of the father by the will. This is supported by a Supreme Court case cited us from Pennsylvania.

So the decree of the court is that the widow has a life estate only in this farm. Counsel may make such an entry as will protect these parties. I have not gone any further than that, but I presume that a trustee should be appointed and the fund invested.

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In re Will of Charlotte Murray.

**THERE CAN ONLY BE ONE LEGAL WILL IN FORCE AT
THE DEATH OF A TESTATOR.**

Probate Court of Hamilton County.

IN THE MATTER OF THE ESTATE OF CHARLOTTE MURRAY,
DECEASED.

Decided, December 17, 1917.

Wills—Grounds for Refusing to Admit a Lost, Destroyed or Spoliated Will to Probate—Presumption that a Second Will Was Destroyed by Testatrix Prior to Her Death—Effect of Disability Subsequent to the Making of a Second Will—Circumstances Showing Intention to Republish a Former Will.

1. Where a second will can not be produced, and there is no evidence that it was lost or destroyed after the death of the decedent or was in existence at the time of her death, a presumption arises that it was destroyed by the testatrix herself, and the burden of proving the contrary is on the proponents.
2. The fact that the decedent was under legal disability for some time after the making of said second will, which required the appointment of a guardian, does not raise a presumption that the second will was destroyed by her during such disability, when it appears that time intervened between the making of said will and the beginning of her disability and also between her restoration to reason and her death.
3. An endorsement made on her first will by testatrix in her own handwriting, in which she attempted to change the beneficiary of one of the legacies therein subsequent to the execution of her second will, must be treated as a supplement or codicil of her first will, but in the instant case was without force or effect, for the reason that it was not witnessed and also because it was made during the period of her disability.
4. The fact that the testatrix was under legal disability at the time the said endorsement was made does not necessarily show mental incapacity, but may be regarded as a circumstance indicating an intention on her part to republish her first will.
5. A second will, as contemplated by Section 10562, must have had a legal existence at the time of the death of the testator and Sections 10543 and 10546 must be read and considered in connection with Section 10562. There can not be at the death of the testator more than one legal will in force.

Dempsey & Nieberding and *Schorr & Wesselmann*, for the will which was probated.

Talbott & Talbott, Galion, Ohio; *Lorbach & Garver*, *Dinsmore & Shohl* and *John G. O'Connell*, contra.

LUEDEERS, J.

Charlotte Murray on the 18th day of January, 1905, executed a paper writing purporting to be her last will and testament, disposing of real and personal property, and by the terms of this paper writing Elma Murray now Elma M. Sandifer, daughter of Wilbur H. Murray, deceased, is residuary devisee. Said paper writing is produced in this court for probate.

On the 27th day of January, 1911, Charlotte Murray executed a second paper writing purporting to be her last will and testament; and this paper writing has not been and can not be produced, and it is claimed that it was either lost or destroyed through no act or fault of Charlotte Murray.

On the 12th day of April, 1912, Charlotte Murray was adjudged by this court to be of unsound mind; and thereupon a guardian was duly appointed to take care of and manage her estate.

On the 24th day of May, 1915, and while under guardianship out of this court, there was endorsed on the back of the paper writing dated January 18th, 1905, in Charlotte Murray's own handwriting, the following:

"It is my wish that my mother's share shall go to my sister, Miss Harriet Hinchy."

This indorsement purports to be the revocation of a legacy contained in the 1905 will, and in favor of a certain legatee, and substituting another and different legatee. This indorsement or revocation bears Charlotte Murray's signature, but is devoid of witnesses.

On the 7th day of July, 1916, Charlotte Murray was restored to her rights and reason and her disability removed by order of the common pleas court, which order also vacated the guardianship.

On or about the 4th day of June, 1917, Charlotte Murray departed this life.

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It is now sought to admit to probate and record:

First. The paper writing dated January 18th, 1905, as Charlotte Murray's last will and testament, together with the indorsement referred to herein substituting a different legatee;

Second. To establish the existence and subsequent loss or destruction of the second paper writing dated January 27, 1911, and also to establish its contents; and when established to have such paper writing admitted to probate and record as the last will and testament of the deceased.

Section 10543, General Code, provides as follows:

"The probate court may admit to probate a last will and testament which it is satisfied was executed according to the provisions of law in force at the time of its execution, and not revoked at the death of the testator, when such original will was lost, spoliated, or destroyed, subsequent to the death of such testator, or after he became incapable of making a will by reason of insanity, and it can not be produced in court in as full, ample, and complete a manner as the court now admits to probate last wills and testaments the originals of which are actually produced therein for probate."

By Section 10544, General Code, it is provided that notice shall be given to all persons whose interest it may be to resist the probate of a lost, spoliated or destroyed will; and

By Section 10545, General Code, it is provided that the court shall cause the witnesses to such will, and such other witnesses as any person interested in having it admitted to probate desire, to come before the court.

Section 10546, General Code, provides that if upon such proof the court is satisfied that such last will and testament was executed in the mode provided by law in force at the time of its execution, that its contents are substantially proved, *that it was unrevoked at the death of the testator and has been lost, spoliated or destroyed since his death*, or his becoming incapable as afore-said, such court shall find and establish the contents of such will as near as can be ascertained and cause them and the testimony taken in the case to be recorded in such court.

It is sought under these sections to establish the contents and loss or destruction of and to admit the paper writing dated January 27th, 1911, as Charlotte Murray's last will and testament.

It must follow that if this paper writing is the last will and testament of the decedent, then the paper writing dated January 18th, 1905, is not her last will, and probate thereof must be refused.

The first question to consider is, whether there is a second will; and if so, had it a legal existence at the time of the death of the testator?

The burden of proof to establish this is on the proponents. The terms "lost," "spoliated" or "destroyed" as used in the General Code are synonymous terms, yet there may be a discrimination between them: a lost will would be one that can not be found; a destroyed will would be one that can not be produced; a spoliated will might be a will mutilated, partly lost, or partly destroyed; but the proof required to establish a spoliated, lost or destroyed will is identical.

There is evidence tending to show that on the 27th day of January, 1911, Charlotte Murray executed in due form a will; and that this will was at that time in her possession and custody. There is no evidence as to how long it was in her custody or control, and no evidence that this will was in existence at the time of her death on June 4th, 1917, or that it was lost or destroyed after her death. As this proof is pre-requisite under the General Code, the proponents of the alleged second will in that respect have failed to establish a will of the date of January 27th, 1911.

The failure to produce such will or to account for its non-production raises the presumption that the will was destroyed by the testator.

In the case of *Behrens v. Behrens*, 47 O. S., page 323, the court held that

"Where a will, once known to have existed and to have been in the custody of the testator, can not be found after his decease, the legal presumption is that the testator destroyed it with the intent to revoke it."

This case is followed in: *William v. Miles*, Nebraska Reports 68, page 463; *Hamilton v. Crowe*, 175 Mo., 634; *In re Bell Estate*, 13 S. D., page 475; *In re Miller Estate*, 49 Oregon, page 452;

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• *In re McCoy Estate*, 49 Oregon, page 579, and *In re Mary Sinclair's Will*, 5 O. S., 291, the court in construing several questions said:

“The legislation of this state as it now exists does not permit a will lost, spoliated or destroyed to be established unless it existed subsequently to the death of the testator.”

Judge Swan in deciding the case, further said:

“The General Assembly deemed it impolitic, as opening the door to imposition and perjury, or unnecessary to permit wills lost or destroyed before the decease of the testator to be established.”

See also *Cole v. McClure et al*, 88 O. S., page 1.

It must be, however, understood that if the proof had shown that this paper writing was lost or destroyed prior to the death of the deceased, but without her knowledge or against her will, it could be offered for probate. But there is no evidence to show that fact. It is, therefore, immaterial what the contents were of this paper, and whether all the statutory requirements as to its execution as a will had been complied with.

The application for probate of the so-called 1911 will, is refused.

The next question to consider is, whether the paper writing dated January 18th, 1905, is the last will and testament of the decedent.

• It is contended that the decedent having executed a second will on January 27th, 1911, that under Section 10562, General Code, the destruction or loss of the second will did not revive the first will and that the testator died intestate.

For the solution of this contention we must look to Section 10562, which provides as follows:

“After making a will, if the testator duly makes and executes a second will, the destruction, canceling or revocation of the second will shall not revive the first will unless the terms of such revocation show that it was his intention to revive and give effect to the first will, or after such destruction, canceling or revocation, he duly republishes his first will.” R. S., Section 5960.

On first examination the contention would seem to be well taken, but does the section in fact warrant such construction as contended?

In the construction of the statutes, the legislative intention is to be determined and effect given thereto. In doing so, courts must regard the object to be ascertained and the mischief guarded against.

Statutes should be construed so as to be given a reasonable meaning and operation and courts will not permit a law general in its nature to deprive one of any of his rights, legal, equitable or statutory unless such general law says so.

A construction leading to absurd consequences will be deemed not intended. The right to make a will is a statutory right. Without the statute, there would be no power to dispose of property after death. The statute does not limit the number of wills; one has the right to execute as many wills as he chooses; nor is there a restriction upon the testator in destroying any or all wills he may make, provided only that he is of age and under no legal disability. At the time of any testator's death there may be in existence one or more wills; but the one to be effective must be his *last* will—not necessarily last in date but in force. Legal wills executed after the execution of the first, revoke all previous wills on the death of the testator, but not before his death. There can not be at the time of the death of the testator more than one legal will in force.

With these observations, let us consider the questions before us:

We find her will dated January 18th, 1905, is her first will. Let us assume that she made a second will dated January 27th, 1911. This second will can not be produced nor is there any evidence that it was in existence at the time of her death or that it was lost or destroyed after her death. A legal presumption therefore arises that the testator destroyed the will; that it is no longer in existence, and was not at the time of her death.

There is, therefore, no second will in contemplation of law in existence upon which any statute could take effect.

A second will as contemplated by Section 10562 must have a legal existence at the time of the death of the testator, but which was, after his death, lost or destroyed.

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When it is so made to appear, then such loss or destruction would revive the first will. Why? Because the testator intended that the second will shall be in force and not the first will.

Section 10543 has reference to a will lost, spoliated or destroyed *subsequent to the death of the decedent* or after he became incapable of making a will by reason of insanity.

Section 10546 in substance provides that a will unrevoked at the death of a testator which has been lost, spoliated or destroyed *since his death*, or his becoming incapable as aforesaid, may, on proper proof, be admitted to probate.

All these sections must be read and considered in connection with Section 10562. It must be borne in mind that such loss, spoliation or destruction of a will after the death of the testator could not become the act or fault of the testator. In other words, he is to be protected against the revival of his first will and to give force to his second will, unless upon proof it is shown that it was his intention to revive and give effect to his first will.

But, when, as in this case, there is no second legal will in existence at the time of the death, it must follow that Section 10562 does not and can not affect the first will.

It must be apparent that Section 10562 does not contemplate a will destroyed, cancelled or revoked by the testator or destroyed by him after he became incapable of making a will by reason of insanity, nor does it contemplate a will destroyed after his death.

It can not be possible that the will destroyed by the testator and, therefore, legally not in existence at the time of his death, a will that has no force or effect and never had, can devitalize a valid and existing will.

It will also be observed that Section 10562 does not provide any mode showing the intention of the testator to revive the first will, or the manner of republishing the same. It would, therefore, depend upon proof satisfactory to the court showing such intention.

The fact that Charlotte Murray destroyed the will of January 27th, 1911, and not the first, although she could have done so, having possession of the same, and that on May 24th, 1915, in

her own handwriting over her own signature undertook to change a legacy which she had given in her first will by making an indorsement to that effect upon the 1905 will, are strong circumstances showing that it was her intention to revive her will, and was, in a certain sense, a republication.

It is true that at the time she made this indorsement she was under legal disability, but that simply goes to the validity of the indorsement and does not necessarily affect her mental capacity. This circumstance negatives the theory that the second will was in existence at that time, and makes it apparent that she did not intend to die intestate.

The decedent was adjudged insane on the 12th day of April, 1912, and remained under legal disability until July 7th, 1916. It may be claimed that during this period she destroyed the second will; were that an established fact, which it is not, then the destruction of the second will by her would not have revoked it, and the second will would be her last will; nor does a presumption of its destruction during that period arise. Otherwise, it would exclude the period which elapsed after she had been restored to reason and the time of her death—about eleven months.

We next come to consider the indorsement made by the testator on the will of January 18th, 1905. This indorsement may be considered as a supplement to, and treated as a codicil to the will, for it does not revoke the will but seeks only to change a bequest made, leaving all the other provisions in force.

A codicil, in order to be effective, must be executed with the same formality, and the testator must exercise the same power and capacities, as is requisite in the execution of a valid will.

This codicil has not the requirements of a valid will. It has no witnesses. Then again, it was made and signed by the testatrix while under a legal disability.

The probate of this codicil will be refused.

Upon proper proof as to the execution and testamentary capacity of the testatrix on January 18th, 1905, the will of that date will be admitted to probate and record.

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State v. Joiner.

**JURISDICTION OVER MINORS UNDER EIGHTEEN YEARS
OF AGE CHARGED WITH CRIME.**

Common Pleas Court of Geauga County.

STATE OF OHIO V. FORREST JOINER ET AL.

Decided, September Term, 1917.

Minors Charged With Crime—Juvenile Court Vested With Exclusive Jurisdiction—Where Accused is Under Eighteen Years of Age—Indictment Void Where Accused Was Bound Over by a Magistrate.

1. The juvenile court has exclusive jurisdiction over minors who are under eighteen years of age and charged with crime, whether misdemeanor or felony.
2. Where a minor under eighteen years of age is charged with a felony, it is discretionary with the juvenile judge whether he will commit him to the care of a probationary officer or the state reformatory, or bind him over to the grand jury under the general criminal laws.
3. The exercise of jurisdiction by the juvenile judge in the matter of an accused minor under eighteen years of age is a pre-requisite to the vesting of jurisdiction over him by the common pleas court, and where such discretion has not been exercised, but the accused has been bound over to the common pleas court by a magistrate an indictment thereafter returned against him is void.

Wilmot & Bostwick, for state.

Fillius & Sullivan, contra.

REYNOLDS, J.

This is the case of the state of Ohio, plaintiff, vs Forrest Joiner and Ray Joiner, defendants.

The grand jury of this county at the September term of this court, 1917, returned an indictment against the defendants charging them with the crime of murder while attempting to commit robbery. To this indictment the defendants have filed an amended plea in abatement, and to this amended plea in abatement the state has interposed a demurrer, and now comes Forrest Joiner, by his counsel in open court and upon his own

motion and by leave of court, withdraws the plea in abatement in all respects as it may affect him, the said Forrest Joiner.

Now, this cause is before the court for the determination of the question raised by the plea in abatement and the demurrer thereto with respect solely to the defendant, Ray Joiner.

The defendant, Ray Joiner, by his plea in abatement maintains that he is a minor under the age of eighteen years and was under the age of eighteen years when the alleged act for which he stands indicted was committed.

And further claims that by reason of his minority that the justice of the peace had no jurisdiction to hear and determine the charge against him which was raised by the affidavit charging him with the commission of the alleged crime of murder, and the proceedings had before the said justice of the peace were void for want of jurisdiction; further, that the action of the grand jury in returning said indictment was without authority in law and therefore void and that the court should not further proceed against him under this indictment and that he should not be required to plead to said indictment.

The questions presented call for a construction of the sections of the code with reference to the procedure when minors under the age of eighteen years are charged with crime, in this case murder in the first degree. For the purpose of this hearing the demurrer admits every fact that is well pleaded in the amended plea in abatement.

Section 1639, General Code, provides:

“Courts of common pleas, probate courts, insolvency courts and superior courts, where established, shall have and exercise, concurrently, the powers and jurisdictions conferred in this chapter. The judge of such courts in each county at such times as they determine shall designate one of their number to transact the business arising under such jurisdiction. When the term of the judge so designated expires or his office terminates another designation shall be made in like manner. The words ‘juvenile court,’ when used in the statutes of Ohio, shall be understood as meaning the court in which the judge so designated may be sitting while exercising such jurisdiction, and the words ‘judge of the juvenile court,’ or ‘juvenile judge,’ as meaning such judge while exercising such jurisdiction.”

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Section 1642 of the General Code provides:

“Such courts of common pleas, probate courts, insolvency courts, and superior courts, within the provisions of this chapter shall have jurisdiction over and with respect to delinquent, neglected and dependent minors under the age of eighteen years and not inmates of a state institution or any institution incorporated under the laws of the state for the care and correction of delinquent, neglected and dependent children, and their parents, guardians, or any person, persons, corporation or agent of a corporation responsible for, or guilty of causing, encouraging, aiding, abetting, or contributing toward the delinquency, neglect or dependency of such minor, and such courts shall have jurisdiction to hear and determine any charge or prosecution against any person, persons, corporations or their agents for the commission of any misdemeanor involving the care, protection, education, or comfort of any such minor under the age of eighteen years.

The Legislature has established the juvenile court in the exercise of its police power to protect children and to remove them from evil influences. *Children's Home Society v. Fetter*, 90 O. S., page 110.

The juvenile court act which provides for the care of delinquent children does not declare delinquency a crime and such statutes are corrective and not criminal. *In re Januszweiski*, 196 Fed., 123.

Section 1644, General Code, delinquent children defined:

“For the purpose of this chapter the words ‘delinquent child’ includes any child under eighteen years of age who violates a law of this state or a city or a village ordinance, or who is incorrigible, or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly visits or enters a house of ill repute, or who knowingly patronizes or visits a policy shop or place where any gambling device or gambling scheme is, or shall be operated or conducted, or who patronizes or visits a saloon or dram shop where intoxicating liquors are sold, or who patronizes or visits a public pool or billiard room or bucket shop, or who wanders about the streets in the night time, or who wanders about railroad yards or tracks, or jumps or catches on to a moving train, traction or street car, or enters a car or engine without lawful

authority, or who uses vile, obscene, vulgar, profane, or indecent language, or who visits or frequents any theater, gallery, penny arcade, or moving picture show where lewd, vulgar, or indecent pictures, exhibits or performances are displayed, exhibited or given, or who is an habitual truant, or who uses any injurious drug. A child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person and be proceeded against in the manner herein provided."

Delinquency has not been declared a crime in Ohio, and the Ohio juvenile act is neither criminal nor penal in its nature, but is an administrative police regulation of a corrective character; and while the commission of the crime may set the machinery of the juvenile court in motion the accused was not tried in that court for his crime but for incorrigibility. 196 Fed., 123.

Section 1652, General Code:

"In case of a delinquent child the judge may continue the hearing from time to time and may commit the child to the care and custody of a probation officer and may allow such child to remain at its home subject to the visitation of the probation officer or otherwise as the court may direct, and subject to be returned to the judge for further and other proceedings whenever such action may appear to be necessary, or the judge may cause the child to be placed in a suitable family home subject to the friendly provision of the probation officer and the further order of the judge, or he may authorize the child to be boarded in some suitable family home in case provision be made by voluntary contribution or otherwise for the payment of the board of such children until suitable provision be made for it in a home without such payment, or the judge may commit such child, if a boy, to a training school for boys, or if a girl, to the Girls' Industrial School for girls, or commit the child to any institution within the county that may care for delinquent children, or be provided by the state or county, suitable for the care of such delinquent. In no case shall a child committed to such institutions be confined under such commitment after attaining the age of twenty-one years, or the judge may commit the child to the care and custody of an association that will receive it embracing in its business the care of neglected or dependent children, if duly approved by the board of state trustees as provided by law. Where it appears at the hearing of a male delinquent child that he is sixteen years of age or over and has committed a felony the juvenile court may commit such child to the Ohio State Reformatory."

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Section 1681, General Code, provides:

“When any information or complaint shall be filed against a delinquent child under these provisions charging him with a felony the judge may order such child to enter into recognizance, with good and sufficient surety, in such amount as he deems reasonable for his appearance before the court of common pleas at the next term thereof. The same proceedings shall be had thereafter upon such complaint as now authorized by law for the indictment, trial, judgment and sentence of any other person charged with a felony.”

This section is discretionary and not mandatory and a delinquent child charged with a felony may be committed, as provided in General Code, 1652, or recognized to the court of common pleas subject to the requirements of the general criminal laws of the state at the discretion of the juvenile judge. 23 C.C. (N.S.), 442.

Section 1683, General Code:

“While this chapter shall be liberally construed to the end that proper guardianship may be provided for the child, in order that it may be educated and cared for as far as practicable in such manner as best subserves its moral and physical welfare, and that as far as practicable in proper case, the parent, parents or guardian of such child may be compelled to perform their moral and legal duty in the interest of the child.”

It is clear to this court that our Legislature with one stroke conferred upon the juvenile court, where established, exclusive jurisdiction of minors under eighteen years of age, who may be charged with the violation of a law of this state, or a city or village ordinance.

The plea in abatement in this case and the affidavit filed in support thereof disclose this fact, to-wit: The defendant, Ray Joiner, was born on the 28th day of March, 1902, hence he became fifteen years of age on the 28th day of March, 1917, which clearly brings him within the provisions of the juvenile act.

The state maintains that the juvenile act is unconstitutional in this, that it contravenes Article I, Section 9 of the Constitution of Ohio, which provides:

"All persons shall be bailable by sufficient surety, except for capital offenses, where the proof is evident or the presumption great."

As we understand this provision of the Constitution, it lies within the sound discretion of the juvenile judge (Section 1681 of this act), or of the common pleas court judge having jurisdiction of a defendant, whether or no the defendant charged with a capital offense shall be admitted to bail, hence the juvenile act is not unconstitutional in this respect.

The state of Ohio most earnestly urges this proposition, that the defendant having been indicted by the grand jury of this county for the alleged crime of murder in the first degree, that said indictment is a good and valid indictment on account of the nature and degree of crime charged in the indictment.

This contention is sound unless the Legislature by the juvenile act conferred upon the juvenile court exclusive jurisdiction with respect to minors under eighteen years of age charged with crime without respect to the nature, grade, or degree thereof.

Construing the juvenile act in its entirety we are clearly of the opinion that the juvenile court has the exclusive jurisdiction of minors under eighteen years of age who may be charged with the commission of any crime whether it be a misdemeanor or felony; further, the defendant has been deprived of the legal right to have the juvenile judge in the exercise of his sound discretion determine and say with respect to two events, viz., first, whether the defendant shall be held to bail for his appearance before the court of common pleas, or whether the defendant may, in the sound discretion of the juvenile judge, be committed to the Ohio State Reformatory, or otherwise proceeded against. It is perfectly obvious that this legal right has been denied to the defendant. The sound discretion of the juvenile judge is prerequisite to the vesting of jurisdiction in the common pleas court. It is the ushering in of a new era for all children who may come within the provisions of its saving grace.

When a child under eighteen years of age has been by the juvenile court found to be a delinquent child as defined by the juvenile court act, and the juvenile court further finds that said

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delinquency is grounded in a felony, the delinquent child is dealt with on account of being found to be a delinquent child and is not punished under our criminal laws for the felony out of which the delinquency sprang *unless* the juvenile judge in the exercise of his discretion binds the defendant child over to the common pleas court as provided by Section 1681 of this act.

In our opinion this is the broadest and most humane act given to a people since the signing of the Magna Charta by King John. It is in tune and in step with every inspiring thought and noble impulse concerning the care, safety and well being of children under eighteen years of age.

To be sure the record of the justice of the peace is silent as to the age of the defendant, neither was there anything said or done tending to establish the age of the defendant before the justice of the peace, neither does the defendant in his plea in abatement claim that his age was made known to the justice of the peace, and it is not contended in this hearing that there was anything concerning or about the appearance of the defendant or his conduct in the justice of the peace court that in any way tended to charge the justice of the peace with knowledge of the age of the defendant, of and concerning which he himself was silent.

All this is unavailing to the state because the justice of the peace had no jurisdiction over this defendant, and by no act or conduct of the defendant could the justice of the peace acquire jurisdiction over him. Had the defendant fled following the commission of the alleged crime, and had he remained in hiding until the grand jury returned an indictment against him and following that, and for the first time he was apprehended and brought into the common pleas court to answer to said indictment, even under these circumstances the minor defendant has the legal right to be first arraigned in the juvenile court and there receive the benefit of the sound discretion of the juvenile judge as provided by Section 1681 of this act, and this initial proceeding before the juvenile court is prerequisite to the vesting of jurisdiction in the court of common pleas or in the grand jury to return a valid indictment against this defendant.

The juvenile court was created and set apart from the criminal branch of the common pleas court for the purpose of providing a court of refuge where all children under eighteen years of age who are charged with the violation of a law of this state must first be brought that their offenses or crimes, whether misdemeanors or felonies, shall be first inquired into by the juvenile court. It matters not whether the child be seventeen or seven years of age just so he be under eighteen years of age.

The court keenly appreciates the fact that this is a wide departure from the old and well beaten path of criminal procedure. Under the old English laws there were more than sixty offenses which were declared to be capital crimes and now in this country we have but one crime, except treason, which is punishable by death, to-wit, the crime of murder with this ingredient, premeditated malice aforethought. We speak of these to indicate the trend of our civilization, and we firmly believe that the juvenile act is as certain as human destiny and as enduring as truth itself.

We have been drawn to this conclusion by the irresistible force of reasoning and we find that the plea in abatement is true, and the demurrer is therefore overruled. And we further find and hold that the indictment in question is void and of no force or effect in law as against the defendant, Ray Joiner, and the court further finds that said indictment is valid as against the defendant, Forrest Joiner.

The defendant, Ray Joiner, is, by order of this court, ordered transferred into the custody of the juvenile judge, there to be proceeded with as provided by law.

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**APPLICATION OF THE STATUTE OF FRAUDS TO A VERBAL
CONTRACT WITH DIFFERENT PERIODS
FOR PERFORMANCE.**

Common Pleas Court of Cuyahoga County.

LOUISE J. CONNELLEY v. FRANCIS A. BYERLEY.

Decided, December 20, 1917.

*Verbal Contract to Make Payments to Heirs—In Consideration of Their
Forbearing Suit to Contest the Will—Does Not Fall Within the
Statute of Frauds—Where Both Parties Elected to Treat the Con-
tract as Valid and There Has Been Part Performance.*

1. F. X. B. died testate February 9, 1911, leaving eight children. F. A. B., one of the sons and executor and trustee under the will, was left by the will practically one-half of the father's estate. The other heirs threatened to institute proceedings to contest the will; thereupon F. A. B. entered into a verbal contract with the other heirs and legatees to pay his five sisters one-eighth, from his share under the will, of certain claims for infringements of a patent issued to the testator in his lifetime, suits for which were then pending, provided the other heirs did not institute proceedings to contest the validity of the will. Negotiations for the settlement of these claims were also pending at the time of testator's death. During the year 1911 about \$30,000 of these claims were collected and distributed by F. A. B., the executor, according to the terms of the verbal contract. After the lapse of two years from date of probate of the will, the balance, of \$141,000, of these claims was collected by the executor, which he refuses to distribute according to the terms of the verbal contract. C., one of the sisters and a party to the contract, commenced an action against F. A. B., the executor, to recover her share of the moneys so collected on account of these infringement claims; F. A. B., defendant, thereupon invokes the statute of frauds, claiming that at the time the verbal contract was made, the statutory period in which proceedings to contest the will could be commenced was two years after probate, and therefore the plaintiff and the other heirs, parties to the contract, could not, by the very terms of the contract, perform thereunder within one year.

Held: That F. A. B., the defendant, having elected to treat the verbal contract as valid by the distribution of the \$30,000 collected during 1911, and the plaintiff and the other sisters also having elected to treat the contract as valid by accepting their share of

the amount so distributed, and the plaintiff and the other heirs, parties to the contract, having in good faith fully performed under the contract by refraining from instituting proceedings to contest the will within the time in which such proceedings could be brought, and being now barred from bringing such proceedings, the defendant can not now invoke the statute to defeat the plaintiff's claim below.

2. A verbal contract which may be performed within one year from date thereof by one party but can not be performed by the other party thereto until after two years from date thereof, does not fall within the statute of frauds where the party who may perform within one year from its date elects to treat the contract as valid and receives large benefits by so doing, which he refuses to return and has, by his conduct in relation to the contract, rendered it impossible for him to restore the parties to their original condition or place them *in statu quo*.
3. If an agreement not in writing can or may be performed and entirely executed on one side within a year, though it can not be performed on the other, it is not within the statute if the party who can or may perform within a year elects to treat the contract as valid and partly performs under such election and can not thereafter restore the parties to their former situation.
4. A verbal contract which could be fully performed on one side within one year and from which it appears that the intention of the parties, founded on reasonable expectation, was that it should be fully performed by one side within a year from date, and such side or party elected to so perform, and in fact, partly so performed, the fact that the other side or party could not perform within two years from its date, by reason of circumstances they could not control, if such party fully performed when performance was possible, does not bring the contract within the inhibition of the statute after such full performance, if the parties can not be restored to their original situation, for the reason that the party who could perform within a year, having received all the benefits of the contract, and it being impossible to restore the *status quo*, the party receiving and accepting such benefits will not be permitted to invoke the statute to defeat the rights of the other party when such rights are irrevocably lost.

Amos Burt Thompson, for plaintiff.

White, Johnson, Cannon & Neff, contra.

FORAN, J.

Francis X. Byerley died testate November 9, 1911, leaving three sons and five daughters living. In his last will and testament, after making certain dispositions of his property among

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his eight children, he disposed of certain claims for profits and damages on account of the infringement of a patent that had been issued to him in his lifetime. Five-eighths of these claims were, by the terms of the will, bequeathed absolutely to the defendant, Francis A. Byerley, a son of the testator, the other three-eighths being equally divided between the remaining children. Shortly after the death of Francis X. Byerley all the children or legatees under the will met at the house of the plaintiff, when the validity of the will was discussed, some of the heirs claiming that the will did not represent the wishes or the intention of their father and was unfair particularly to the daughters of the testator, and plaintiff claims that the defendant was then and there informed that unless he divided among the five daughters one-eighth of the proceeds of the infringement claims, in addition to the amount bequeathed to them in the will, they would bring proceedings to contest the will; and that thereupon the defendant, who was made executor and trustee under the will, agreed with the plaintiff and the other heirs that if they would agree not to contest the validity of the will, he would distribute equally among the five daughters one-eighth of the proceeds of the infringement claims as collected, in addition to the share bequeathed to them by the will of their father. And the plaintiff says that, in consideration of this agreement, the defendant agreed to so distribute to these five daughters one-eighth of the infringement claims of damages in addition to that left them by the terms of the will. Plaintiff further claims that she and the other heirs who were parties to this agreement have fully performed all the conditions thereof, and that defendant has failed and refused to perform and carry out the terms and conditions of the contract upon his part, and that there is therefore due her a certain sum of money under the terms of this agreement or contract.

The defendant admits that there was a meeting of all the heirs at the plaintiff's house on or about the 17th day of February, 1911, and that the will of their father was then and there discussed; but he claims that the agreement was that if the other heirs brought no proceedings of any kind to cause him trouble or to hamper or impede him in the administration of the estate, he would pay one-eighth of the proceeds of the infringement claims

to the five daughters, in addition to the sum left them by the terms of the will.

It is agreed by the parties that during the year 1911 a large sum of money, perhaps thirty or forty thousand dollars, was collected on account of these infringement claims and distributed among the five daughters, each receiving an amount equal to one-eighth of the claims so collected, according to the terms of the contract.

It is also admitted that after the expiration of two years from February 17, 1911, a further sum of \$141,000 was collected on account of these claims, which sum the defendant refuses to distribute according to the terms of the contract as claimed by the plaintiff, or according to the terms of the contract or agreement as claimed by the defendant; and for the reason, as defendant claims, that the plaintiff and the other heirs did institute proceedings in the probate court of such a nature as to impede and hamper him in the administration of the estate and to cause him trouble in such administration.

The proceedings in the probate court were objections filed to the partial reports of the executor and trustee. The contention of the defendant is that the action for the infringement claims or damages was brought in the name of Francis X. Byerley in his lifetime, and that, as a matter of fact, Francis A. Byerley, the defendant, owned and had an interest in the patent issued to Francis X. Byerley; and that the reason he made the agreement as he claims it was made was that it was dangerous to the collection of these claims to have it become known that Francis X. Byerley was not the real party in interest; and for that reason the defendant did not desire any litigation which would call in question the title to this patent.

After a jury had been impanelled and sworn, the defendant interposed an objection to the introduction of any evidence, for the reason that the agreement or contract declared upon by the plaintiff, and as appeared from the opening statement of plaintiff's counsel, was within the statute of frauds, and that it could not be performed within one year, for the reason that on February 17th the period of time during which a will contest could be instituted was two years from the date of probate. It was admitted that the will was probated on the 15th day of February,

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1911. The objection being in effect a demurrer to the evidence and petition, it must be assumed the contract was as claimed by the plaintiff and it will be so treated.

The precise question presented by the motion or demurrer of the defendant has never been decided in this state, nor has any other precedent or authority been cited outside of the state that is squarely in point.

Counsel for the defendant, who is always engenuous, candid, honest and fair in his statements to court and jury, frankly admitted in his statement to the jury that if an action had been brought to contest the validity of the testator's will, the defendant was liable to lose a large sum of money, perhaps five-eighths of over \$200,000, as practically that amount had been collected from various concerns who had infringed upon the patent of the testator.

As has been already said, this condition grew largely out of the fact that the infringement suits had been brought in the name of the testator, and if the fact was disclosed that the patent was owned by the testator and the defendant, or the partnership which had existed between the testator and the defendant, the right of recovery would be seriously jeopardized, that is, if it was made to appear that the defendant, as he claims, had an interest in this patent, recovery would be extremely doubtful. This being so candidly and frankly admitted, it will be seen the defendant had a large pecuniary interest in preventing any litigation that would endanger the successful prosecution of these suits. If, therefore, the contention or the allegation of the plaintiff's petition that the agreement was as is therein set forth, it will be readily seen that the agreement or contract, if one was made as the plaintiff claims, was very beneficial to the defendant. Courts have always held that the enforcement of good faith in matters of bargain and contract, next to the enforcement of laws for keeping the peace and securing property against invasion, violence and fraud, is the most important function of legal justice. Indeed it is known to all members of the legal profession that less than one hundred years ago an attempt was made, with considerable success, to extend the range of enforceable contracts without regard to what the principles of law would bear, in order to satisfy a sense of natural justice. As a general rule, in

matters of contract the ascertained will of the parties should prevail; but there are limits to the force of this general rule fixed by statute, which is of course above individual will or private interests; and this grows out of the need of securing good faith and justice to parties against fraud and misadventure; but the scope of these statutes ought not to be extended to defeat the very purpose for which they were intended or designed. The object of the statute of frauds, now invoked, was or is not to declare a promise or an agreement void, but to require a certain kind of proof essential to its enforcement. Because it was thought oral proof was prolific of fraud and perjury, it was deemed necessary to require written evidence of the making of certain kinds of contracts. It must be admitted that human memory is fallible; and oral agreements, so far as their precise terms are concerned, are difficult of establishment or enforcement after a lapse of one or more years after the date or time such agreements are said to have been made. It is quite evident, however, that these statutes in very many cases have been the means of perpetrating more frauds and injustice than they have prevented. Hence when their enforcement would necessarily result in the infliction of injustice, courts are inclined to construe them strictly, and to insist that the facts, in every case in which they are invoked, shall fall squarely within the spirit as well as the letter of the statute.

It is tacitly conceded, if not admitted, that during the period in which the plaintiff could have contested the testator's will, the defendant performed under the alleged agreement either as claimed by the plaintiff or as claimed by him. If he performed under the agreement as claimed by the plaintiff before the time elapsed in which she could bring such a contest of the will, she was, by such performance of the defendant, lulled into inaction. Now, when the plaintiff can not bring such an action, the statute is invoked. No contest was brought either within the two years in which it might have been instituted or at any time. The defendant received the benefit of the good faith of the plaintiff and the other parties to the agreement in refraining to contest the testator's will, and now when that right is irretrievably lost to her and the other heirs, the statute is invoked. Surely the statute ought not to act as a shield to a man who breaks a prom-

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is, and thus enable him to retain, by reason of the statute, the benefits he admits he derived from the parol agreement. Good faith, at least on his part, required that he should have taken advantage of the statute before the period of time in which the contest could be instituted had elapsed, so that the other parties might avail themselves of their right to bring such proceedings if they deemed it advisable to do so. The defendant having failed to invoke the statute during the time within which the contest could be brought, should he be permitted to invoke it now?

The authorities with respect to oral agreements not to be performed within one year are in conflict, the doctrine in Ohio being in many respects materially different from the doctrine in other states. The general rule laid down by Smith in his work on frauds, Section 347, is that:

“If it appears from the contract itself that it was not to be performed within one year, or was not intended to be performed within one year, the statute applies; but if it was a contract which might have been performed within one year, and which the plaintiff, at his option, might have required the defendant to perform within a year, it is not within the statute.”

This is practically the doctrine in Ohio. The Ohio rule is, in effect, that an oral agreement which by its terms is not to be performed within one year from the time it was made will not be enforced, unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or by some person authorized by him to sign it.

In *Westropp v. Westropp*, 13 O. C. C., 244, where the authorities in this and other states are reviewed, it is substantially held that to bring a case within the statute, it must have been expressly stipulated by the parties, or appear to have been clearly understood by them upon a reasonable construction of the contract, that the contract was not to be performed within a year, as where time is fixed in terms.

In that case this court was one of counsel, and it was there held that—

“Where a son placed in the hands of his mother \$500, with the agreement with her that she should use it if needed during her life, the amount unexpended at her death to be paid back to him, such contract is not within the statute of frauds as not to

be performed within one year, although the mother lived eleven years afterwards."

And it was further held that the fact that at the death of the mother her administrator by law would have eighteen months in which to repay the money will not place it within the statute of frauds.

An examination of the authorities seems to show that there is a distinction where the contract is for a given period of time, more than a year, and its ending within that time depends upon the happening of some contingent event, and a contract or agreement where no time is fixed for the contract to run, unless it may end with the happening of some uncertain event which may happen within a year. This is substantially the language of the opinion in the case just cited.

A great many of these oral contracts which are inhibited by Section 8621, General Code, which have been passed upon by the courts are what might be termed service contracts or agreements. *McPherson v. Cox*, 96 U. S., 404, relates to a contract to pay an attorney for services, in suits concerning land, if the lands were recovered. No time was fixed within which the services were to be performed, and it was held that the agreement was not void because not in writing as it might be performed within a year.

It is admitted in the case now before the court that all the claims for infringement damages, suits for which were then pending in the federal courts of several jurisdictions, might be collected within a year from the date of the alleged agreement; and that, so far as the defendant was concerned, even if the agreement was as claimed by the plaintiff, it could have been performed within a year.

In many jurisdictions it is held that if, by the terms of the agreement or a reasonable construction thereof, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application.

This is not the doctrine in Ohio. It was held in *Witter v. Gottschalk*, 5 O. D. (Reprint), 77, that a verbal contract by the terms of which one man agreed not to carry on a certain busi-

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ness in a certain neighborhood for five years, that the agreement was within the statute of frauds and could not be enforced, and that the possibility of the death of one of the parties would not take it out of the statute. This case was affirmed in *Gottschalk v. Witter*, 25 O. S., 76, where it was held in the first part of the syllabus that—

“An agreement by the lessor to let the lessee have the good will of a business, and that the lessor will abstain from carrying on a like business in the same locality for a period of five years, is within the statute of frauds, and voidable if not in writing.”

A great many very respectable authorities, from Supreme Courts whose decisions are generally quoted with approval, do not agree with this doctrine. However this may be, the doctrine of the 25 O. S., just cited, will not be extended beyond the facts passed upon in that case. As a general proposition, the courts will adhere to and follow former decisions where the same points come again in litigation (*Price v. Toledo* [4 C.C.(N.S.), 57], 15 O. C. D., 617); or in other words, the broad principle lying at the base of the doctrine of *stare decisis* is embraced in the maxim *res judicata*, that is, that the matter has been decided; and it will be admitted that the doctrine of *res judicata* binds parties and privies, and that the doctrine of *stare decisis* governs the decisions of the same question in the same way in other actions between strangers to the record.

Admitting the soundness of the doctrine of 25 O. S. (*i. e.*, *Gottschalk v. Witter*), we think it will be found that the facts decided in that case, or that the doctrine therein laid down, does not apply to the case now before the court.

In *Plimpton v. Curtiss*, 15 Wend., 336, it was held in the syllabus that—

“An agreement to save the statute of frauds need not be in writing, although by the terms of it the party may at his election perform the agreement after the year; it is only when it appears by the whole tenor of the agreement that it is to be performed after the year that a note in writing is necessary.”

It will be noticed here that the court distinctly holds that—
“It is only when it appears *by the whole tenor of the agreement* that it is to be performed after the year that a note in writing is necessary.”

In this case the plaintiff declared on a contract made the first day of October, 1828, to do certain work before the close of the year 1829. The statute under consideration was practically the same as the Ohio statute. The defendant was to find timber for the frame of a house and to build the house for the plaintiff; and the court said, on page 337:

"There is nothing in the agreement prohibiting the defendant from completing the contract within six months or a shorter period. Suppose he had done so, and sued the plaintiff for compensation for his labor and the materials found, would it have been permitted to the plaintiff to have said that the contract was not to be performed within a year, and therefore it was not obligatory upon him? Most clearly not. And if obligatory upon one party, it is equally so on the other. The defendant might have performed the contract within a year, and therefore it is not within the statute."

Of course it will be said, admitting this to be true, still the plaintiff in this case could not perform the contract or the agreement as claimed by her within a year. But we want to bear in mind the language of the court, that "If the contract was obligatory upon one party, it is equally so on the other." If the defendant in this case could have performed the contract within a year, and that is admitted, then it was obligatory upon his part to so perform it; and if the plaintiff accepted the benefits of the contract so performed, it is indeed difficult to understand how she could maintain an action thereafter to contest the validity of her father's will, as such acceptance made it obligatory on her.

The question still remains, however, that the plaintiff could not perform the contract within a year.

In *Kurz v. Guarantee Company*, 7 Ohio Nisi Prius, 118, it is held that—

"An oral contract which may be and actually is performed by one party within one year from the date of the making thereof, but is not to be performed by the other party thereto until after one year from the date of said contract, does not fall within the provision of the statute of frauds."

It is admitted now that the defendant could have performed the whole contract within a year so far as he was concerned; and

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if all the damages for infringement claims had been collected, he would undoubtedly have so performed, as he actually did distribute about \$40,000 according to the terms of the agreement as claimed by the plaintiff. The fact that the plaintiff and none of the other heirs ever brought any proceedings to contest the validity of the will of the testator, is conclusive evidence of their good faith to carry out the terms of the contract. They, in fact, fully performed.

The case of *Blanding v. Sargent*, 33 N. H., 239, is a case directly in point. It is here held in the syllabus that:

“If by its terms, or by a reasonable construction, a contract not in writing can be fully performed within a year, although it can be done only by the occurrence of some improbable event, as the death of a person referred to, is not within the statute of frauds. If an agreement not in writing can be performed on one side within a year, though it can not be on the other, it is not within the statute.”

This is a contract somewhat similar to that declared upon in *Gottschalk v. Witter*, 25 O. S., *supra*; and the statute of frauds of New Hampshire is practically the same as that of Ohio. The court, page 246, said:

“Though either of the parties may have it in his power to put an end to a contract within a year, yet if, independent of the exercise of such power, the agreement can not be performed within a year, it must be in writing. If the agreement can be fully performed by either of the parties within the year, and it is so performed, the agreement of the other party is not within the statute, though it may be impossible to perform it within a year.”

It will be noticed here that the language of the court differs somewhat from the language of the syllabus, or the doctrine laid down in the syllabus, because in the syllabus the words “and it is so performed” are omitted. We believe that the doctrine in New Hampshire, as in Ohio, is that the syllabus expresses the doctrine or law of the case.

We are aware that the doctrine of part performance does not pertain in Ohio, except cases in equity; but the doctrine of Ohio is that a party who refuses to go on with the contract after having received the benefit of a part performance must pay for what he has received. This will be admitted.

If the agreement was as the plaintiff contends, that no proceedings should be instituted to contest the validity of the will, and the defendant agreed, in consideration of this promise, to make the payments claimed by the agreement, then he did derive a benefit by the failure to institute such proceedings; and we are inclined to think that he should not avail himself, under all the circumstances, of the doctrine of part performance as defined in Ohio, even if that part performance was upon his part only.

It is admitted that the damages growing out of the infringement suits might have been collected within a year from the time the alleged agreement was made; and if these damages had been so collected, it must also be admitted that the plaintiff could have required the defendant to perform, under the agreement, if it was as she claimed; and it will not avail to say that, notwithstanding the plaintiff required the defendant to perform in such event, she still had a right to institute contest proceedings, for the reason that she would be estopped from bringing such proceedings by the performance of the defendant and her acceptance of the benefits accruing to her from such performance, and because her right to bring such contest lapsed and was extinguished by such acceptance. If the plaintiff brought an action to contest the will two years after the date of probate, she would be unable to maintain the action, because of the statute of limitations; but she could, for all that, have brought the action. We think it idle to say that because the plaintiff could have instituted contest proceedings within two years, even though she had received her full share of all the infringement damages, as provided in the alleged contract, therefore the contract falls within the statute of frauds. If her right to bring this action lapsed or was extinguished by the performance of the defendant and her acceptance of the benefits thereof, it is difficult to understand how her mere right to do a vain, idle and nugatory thing could render this alleged agreement inimical to the statute of frauds.

Although the defendant distributed over \$30,000 of the infringement claims received during 1911, he subsequently, when the time had elapsed in which contest proceedings could be instituted, deducted or withheld the amount so distributed in making further distributions of other funds of the estate aside

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from the infringement assets. He elected to treat the contract as valid when it was beneficial to him to do so, and now seeks to treat it as invalid after having availed himself of the benefits acquired by the contract.

Counsel for defendant insists that the doctrine of *Gottschalk v. Witter*, 25 O. S., 76, is decisive and conclusive of the issues in the case before us.

Before this case can be taken as a controlling precedent it may be well to again define a binding precedent.

As we understand it, a judicial decision can only serve or operate as a precedent for future determinations in similar or analogous cases; that is, the facts in the case in which the precedent is invoked as a governing or controlling rule, though differing in some degree, must be closely alike or similar to the facts in the case in which the judicial decision was rendered.

It therefore becomes necessary to examine the facts and issues in the case relied upon.

There were really two cases between the parties, the first, *Witter v. Gottschalk*, found in the 5 O. D., 77, from which it appears that Witter and Gottschalk entered into a verbal contract in 1871, in the city of Cincinnati, by the terms of which Gottschalk sold to Witter certain personal property and the good will of a business he was then carrying on, and agreed not to carry on the same or a similar business in any part of the city of Cincinnati for five years. The consideration paid by Witter was \$300 cash for the personal property, and \$1,000 in three promissory notes of \$333 each for the good will. These facts were found by the jury in the second case, or the case of *Gottschalk v. Witter*, 25 O. S., 76. In violation of the agreement, Gottschalk, shortly after it had been made and entered into, opened a store and began to carry on the same or a similar business within the area prescribed by the agreement. Witter thereupon commenced an action in the Superior Court of Cincinnati, special term, to enjoin Gottschalk from so doing. Gottschalk in his answer denied in the first defense the contract as claimed by Witter, and in the second defense invoked the statute of frauds. Witter demurred to this second defense. The demurrer was overruled, which action of the court rendered a traverse of the first defense unnecessary. Judgment was therefore

rendered for the defendant, and error prosecuted to the court in general term. It was there held that the contract was within the statute of frauds, and, not being in writing, could not be enforced; and that the contingency or a possibility of Gottschalk's death within one year did not take it out of the statute, "such possibility not making it less a contract not to be performed in a year."

The court bases its decision upon the proposition that the contract, by its very terms, was not to be performed within a year. There being a stipulated time (five years), performance could not depend upon the happening of a contingency such as the death of Gottschalk. The court in its opinion approves the doctrine or the language in *Brown on Statute of Frauds*, Section 273, that—

"The result of the decisions seems to be that the statute does not mean to include an agreement which is simply not likely to be performed, nor one which is simply not *expected* to be performed, but that it means to include any agreement which, fairly and reasonably interpreted, does not admit of a valid execution within the space of a year from the making."

This is the doctrine applied in *Westropp v. Westropp*, *supra*.

The court frankly admits that the authorities are not uniform, but relies upon *Dobson v. Collis*, 1 H. & N., 81; *Packett Co. v. Sickles*, 5 Wall., 580. In the latter case the time fixed was during the continuance of a certain patent; and as this patent had twelve years to run after making the agreement, it was held that by its very terms the contract could not be performed within a year, as the time was in no sense indefinite, but actually fixed by the terms of the verbal contract.

In the second phase of the Gottschalk-Witter litigation, which is the phase or case passed upon in the 25 O. S., 76, Gottschalk brought suit on one of the three promissory notes given him by Witter for the good will of the business. When this case was tried in the court below the jury found, in answer to questions propounded by the trial court, that the contract was as Witter claimed, that the notes were given for the sale of the good will only, and that Witter had fully paid for all he received aside from the good will.

It will be here noticed that when Gottschalk invoked the statute of frauds in the case before the Superior Court of Cin-

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cinnati, 5 O. D., 77 (*supra*), he did not return the \$300 received for the personal property, or offer to restore Witter to the position in which he was before the agreement was made. He elected to treat the contract as a nullity and retain what he had received by its terms. Not only that, but he sought to collect the notes given for the good will which, by his own conduct, he had rendered absolutely valueless. Being defeated in his action on the note and the notes being ordered canceled, he prosecuted error to the Supreme Court. Here the doctrine of *Witter v. Gottschalk*, 5 O. D., 77, was affirmed, though the court in the opinion gave no reason for the doctrine, and it may be fairly said the question was not really before the court. The court, however, in the opinion says, page 80:

"The principal ground of error relied upon is, that the claim set up in the cross-petition (by Witter) was barred by the former action. It is claimed to be a bar for two reasons: 1. Because the plaintiff (Witter), by prosecuting the former action, elected to affirm the contract, which he now seeks to rescind; and 2. Because the matters set up in the cross-petition were adjudicated in that case.

"Neither of these propositions, in our judgment, is maintainable. The former action can not operate to affirm the contract, because the plaintiff, by pleading the statute, has elected to avoid it. He has by this plea reduced the contract to a nullity, and there is, therefore, nothing left to be affirmed. The plaintiff can not at the same time avoid the contract and insist that the parties have elected to fulfill it. The former action was merely an election to affirm the contract, provided the plaintiff did not choose to avoid it by pleading the statute of frauds. The plaintiff had his election, whether to avoid the contract, as he has done in both actions, by his plea of the statute, or to treat it, as the defendant, by his former action offered to treat it, as valid and binding. Having chosen to avoid it, nothing remains but to restore the parties to their former situation. Neither party can avoid the contract and hold on to what he has acquired under it."

This language is significant. The defendant in the case at bar, during 1911, when over \$30,000 of the infringement claims were collected or received by him as executor, had his election to avoid the contract or treat it as valid. He elected to treat the contract as valid by distributing to the plaintiff and the other four sisters one-eighth of this sum in addition to that al-

lowed them under the will. If he at this time elected to avoid the contract, or so elected any time within two years after probate of the will, the plaintiff would be at liberty to institute proceedings to contest the will; but the defendant elected to treat the contract as valid, and proceeded to perform in accordance with its terms until the two years in which contest proceedings could be brought had elapsed, and then, when such proceedings could not be instituted, he elected to treat the contract as void. At the time this contract was made negotiations were pending for the settlement of the infringement suits, and all testimony has been taken in these suits. The \$141,000 which defendant refuses to distribute according to the terms of the contract were collected and came into the hands of defendant long after proceedings to contest the will could be brought. The plaintiff and the other heirs, parties to the contract, had fully performed the contract on their part in refraining to bring contest proceedings; and when their right to do so was lost the defendant seeks to rescind or avoid the contract. Surely the language just quoted is obviously applicable: "Neither party can avoid the contract and hold on to what he has acquired under it." If contest proceedings had been instituted and the question of the title to the patents was raised, as it surely would be in such proceedings, five-eighths of nearly \$200,000 might have been and probably would have been lost to the defendant. Besides, as the defendant was by the terms of the will given practically one-half of the testator's entire estate, and there being eight heirs, a contest proceeding might involve questions which the defendant might find it embarrassing to meet, as he was in close touch with his father in business for many years and the father was 84 years of age when the will was made. It is therefore evident that all the money received from infringement claims, of which five-eighths went to the defendant, was acquired by him by reason of the good faith of the plaintiff in electing to treat the contract as valid, and this he seeks to retain and hold on to and avoid the contract at the same time. This would be manifestly unjust and inequitable—a monstrous contention supported by no authority presented to the court. Both parties elected to treat this contract as valid and began performance thereunder; and we think, whether it was technically fully performed with-

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in two years from the date of the making thereof or fully performed thereafter by the plaintiff and the other heirs, it falls squarely within the doctrine of the 33 N. H. and the 7 N. P., *supra*, and that the defendant should not now be permitted to avail himself of the statute. It is quite evident the defendant paid or distributed about \$30,000 of the infringement claims solely under the contract and with reference to it, and the plaintiff received her share of these claims solely with reference to the contract; and as she and the other heirs in good faith refrained from instituting proceedings to contest the will, we are clearly of the opinion that, both parties having elected to treat the contract as valid, neither should now be permitted to invoke the statute of frauds.

It is uniformly held that while the doctrine of part performance is a doctrine of equity, and does not prevail in law, yet when a man pleads the statute of frauds to avoid a verbal promise, he must return what he has received under the agreement, as where a man sells land on a verbal contract and receives a part of the purchase money, he can not avoid the contract and retain the money actually received. If he chooses to avoid the contract, "nothing remains but to restore the parties to their former situation. Neither party can avoid the contract and hold on to what he acquired under it." 25 O. S., 80, *supra*.

The defendant has acquired very substantial value under the contract which he seeks to retain to the great injury of the plaintiff. It is impossible for him to now restore the parties to the former situation, as the time in which a contest of the will could be instituted has elapsed, and such contest can not now be maintained. The parties can not at this time be placed *in statu quo*, nor can the *status quo* be restored; hence the defendant must be required to pay the plaintiff her proportion of what he acquired in money from the infringement claims under the contract. The plaintiff has no remedy as to anything she may have lost otherwise by not bringing proceedings to contest the will. The contract was fully performed by the plaintiff and the other heirs, and the defendant has reaped the benefit of this performance on their part, and the defendant, having elected to treat the contract as valid while the danger of contest proceedings impended and existed, he will not now be heard to say

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the contract is invalid when this danger no longer impends or exists, and at the same time "hold on to what he acquired under it."

The motion or demurrer will be denied and overruled.

INTEREST ACCRUING ON PROMISSORY NOTES AFTER MATURITY.

Common Pleas Court of Geauga County.

D. C. CHUBB, ADMINISTRATOR OF THE ESTATE OF MYRON RAYMOND, DECEASED, v. LUCIUS G. PATCHIN AND FLORENCE E. PATCHIN.

Decided, September Term, 1917.

Promissory Notes—Common Law Presumption as to Payment of Interest Not Applicable, When—Computation of Interest Accruing After Maturity With Annual Rests Not Authorized.

1. Installments of interest which became due and payable on a promissory note more than twenty years ago are not barred by the common law presumption of payment, where the note itself is saved from the statute of limitations by an endorsement thereon within the statutory period.
2. While it is common practice to compute with annual rests interest which has accrued on promissory notes after maturity, the Ohio law does not authorize that method of computation, and a court in giving judgment for interest accruing after maturity will direct that the interest be computed at the stipulated rate without annual rests.

R. H. Patchin, for plaintiff.

Mr. Alden, contra.

REYNOLDS, J.

This is the case of D. C. Chubb, administrator of the estate of Myron E. Raymond, deceased, plaintiff, v. Lucius G. Patchin and Florence E. Patchin, defendants.

The plaintiff for his cause of action says there is due him from the defendants the sum of \$4,372.82 upon a promissory note, a copy of which is as follows:

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“MIDDLEFIELD, OHIO, April 29th, 1891.

“On or before four years after date we promise to pay to the order of M. E. Raymond \$1,300. Value received. With 6 per cent. interest, payable annually.

“(Signed.) LUCIUS G. PATCHIN,
“FLORENCE E. PATCHIN.”

The following endorsements appear on the back of said note:

“\$125, May 1st, 1899, received \$125, Feb. 12th, 1912, received \$125.”

Plaintiff for his second cause of action says that the defendants executed and delivered to Myron E. Raymond, deceased, their mortgage deed conveying about forty acres of land as security for the payment of the note herein sued upon.

Plaintiff further claims that said conditions set forth in the mortgage deed have been broken.

The defendants answer and admit the execution by them of the note and mortgage set forth in the plaintiff's petition; admit that said mortgage was recorded as alleged by plaintiff; admit that the endorsements mentioned in the plaintiff's petition appear on the back of said note; admit that a certain amount is still due, owing, and unpaid upon said note; and admit that the condition of said mortgage has been broken.

The defendants further answering claim that there have been payments made upon said note to the administrator's decedent in his lifetime, that they were not endorsed upon the note and that on account of said payments alleged to have been made by the defendants upon this note, there is now due and unpaid upon this note the sum of \$2,401.59, only.

The only dispute between the parties to this action is upon the amount due upon the note in question and the court will first determine the number and the amount of payments made upon the note, and also, the amount of the payments, if any, that were made upon the note by the defendants to Myron E. Raymond in his lifetime and were not endorsed upon the note as claimed by the defendants.

The first payment made upon the note, as disclosed by the endorsement thereon, was made May 1st, 1899, \$125. It is disclosed by the evidence in this case that this amount of \$125 was

the purchase price of a horse sold by the defendant Lucius Patchin to Myron Raymond. The next endorsement appearing upon the note bears date of February 11th, 1912, for \$125.

It is clearly established by the evidence before the court that this \$125 endorsement was the purchase price of hay sold by the defendant Lucius Patchin to Myron E. Raymond. It is also clearly established by the evidence that the decedent, Raymond, at the time of the purchase of this hay from the defendant Patchin paid Patchin the sum of \$50 upon the purchase price of said hay, and the agreement between the parties was that the balance of the purchase price, to-wit, \$75, should be endorsed upon the note.

It is perfectly apparent that Mr. Raymond in making the endorsement upon the note on account of the transaction of hay endorsed the full amount of the purchase price of the hay, \$125, when he should only have endorsed \$75 upon the note as that was the balance of the purchase price of the hay. The court is perfectly satisfied that the old gentleman Raymond made a mistake in this respect and gave the defendants credit for \$50 more than they were entitled to receive by reason of the transaction of the hay.

It is further established by the evidence in this case that the decedent Raymond purchased two thousand feet of lumber from the defendant Lucius Patchin for which Patchin was entitled to credit upon the note in question. It appears from the evidence that this lumber was sold by Patchin to Raymond in about January, 1900, and the value of the lumber as determined by the court from the evidence with respect to value which has been offered in this case, the court determines the value of the lumber to be \$19 per thousand feet, therefore, the defendants are entitled to \$38 credit on account of lumber in January, 1900, on this note in question.

It further appears from the evidence before the court that the decedent Raymond purchased four tons of hay from the defendant Lucius Patchin in the year 1913, on or about the month of July thereof. The purchase price of said hay agreed upon was the sum of \$17 per ton, and there being four tons the total price thereof was \$68.

It has been clearly established by the evidence that the decedent Raymond agreed to give the defendant Patchin credit

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upon this note for the sum of the hay thus purchased by him from Patchin and the defendants are entitled to have said amount of \$68 endorsed upon the note in question.

These two items of lumber and hay taken in connection with the two endorsements upon the note as they have been by the court corrected, make the total payment on the note of \$306.

It is further claimed by the defendant Patchin that he paid certain sums of money to the decedent Raymond in his lifetime upon the note in question and for which the decedent failed to credit upon said note. There has been some evidence introduced by very reputable men, residents of this county, tending to establish payments made by the defendant Lucius Patchin to the decedent Raymond during his lifetime, but the evidence is so meagre and so vague as to amounts that the court is unable to determine from the evidence whether or no there was any amount actually paid by the defendant Lucius Patchin to the decedent Raymond in his lifetime to be endorsed upon the note in question. As to this phase of the case the court finds in favor of the plaintiff, and now, we come to ascertain the rule of law governing the computation of interest upon notes of this character.

This note in question is dated April 29th, 1891, and reads, "On or before four years after date we promise to pay to the order of M. E. Raymond, \$1,300. Value received, with 6 per cent. interest, payable annually."

It appears from the face of the note that it became due and payable on the 29th day of April, 1895, consequently, it is more than twenty-two years past due. And it further appears that no payments were made upon said note until after its maturity, the first payment being made May 1st, 1899, of \$125, and this is the payment that kept this note alive and kept it from being barred by the fifteen year statute of limitations.

It is very strongly urged by counsel for defendants, and he has cited a number of authorities in this state in support of his contention, which is in substance this: that the note is barred by the common law presumption of payment on account of a lapse of more than twenty years. Their contention is that those installments of interest which were due and payable by the terms of the note more than twenty years ago are now barred by the common law presumption of payment.

We have given this contention very close study and have spent considerable time in examining all authorities in this state upon that subject. While the common law presumption of payment on account of the lapse of more than twenty years is available in Ohio, at the same time we have a statute in Ohio that works a bar in fifteen years.

It can not be successfully contended that the note is barred under the fifteen year statute of limitations because the endorsement made on the first of May, 1899, clearly keeps the note in force and effect, and now can it be said that because the payments of interest that were due and payable under the terms and conditions of the note more than twenty years ago and which have not been paid are now barred by the common law presumption of payment on account of the lapse of more than twenty years?

The note and the interest are all under one contract, and the interest is an increment of the note and it is a part of the note and to hold that the payments of interest were barred by the common law presumption would be dividing this note into two separate contracts, one for the principal, and the other for the interest due upon the principal, and in effect it would be holding that the note was in full force and effect as to principal and barred by the common law presumption of payment with respect to interest thereon, and the holding of the court is against the defendants on that proposition.

Now, coming to the rule of law as to the computing of interest on this note with the endorsements contained thereon, together with the several sums that the court has heretofore found should be endorsed thereon.

The plaintiff's claim is, that this being an annual interest note the interest to be paid annually, and in default of the payment of interest annually as expressed in the note, that the interest should be computed on the note with the annual rests. To this proposition the defendants have made no contention, but, as it is the duty of the court to determine the correct amount due upon the note we think this subject will bear serious investigation.

The law of Ohio in relation to interest is found in the three following sections. Section 8303, General Code of Ohio, provides:

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“The parties to a bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount thereof at any rate not exceeding 8 per cent. per annum, payable annually.” (Old section of our Revised Statutes was Section 3179.)

Section 8304, General Code:

“Upon all judgments, decrees, or orders rendered, on any bond, bill, note, or other instrument of writing containing stipulations for the payment of interest in accordance with the provisions of the next preceding section, interest shall be computed till payment at the rate specified in such instrument.” (Old section of our Revised Statutes, Section 3180.)

Section 8305, General Code:

“In cases other than those provided for in the next two preceding sections, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account or settlement between parties, upon all verbal contracts entered into and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of a contract or transaction, a creditor shall be entitled to interest at the rate of 6 per cent. per annum, and no more.”

The question here presented is, did installments of interest become due after maturity so as to draw interest, or in other words, should the interest on this note after maturity be computed with annual rests?

In *Cook v. Courtwright*, 40 O. S., 248, the Supreme Court seems unable to give any effect to the words, “Payable annually,” found at the close of Section 8303, General Code, and seems to hold that no effect can be given to these words, and in *Ohio College of Dental Surgery v. Rosenthal*, 45 O. S., 183-191, the Supreme Court says, “It is well settled that our statutes relating to interest were intended to fix the rate and not the time of payment.” So far as we have been able to find the question at bar has never been directly determined by the Supreme Court of this state.

There is no stipulation in these notes in relation to interest after they become due. The defendant is therefore entitled to interest after that time by operation of law and not by any provisions in the notes themselves, citing the case of *Brewster*

v. *Wakefield*, 22 How. (U. S.), 118-127; *In re Bartenback*, 2d Fed., 956, and in *Averill Coal & Oil Co. v. Werner*, 22 O. S., 372, the Supreme Court holds that computing interest with annual rests, without express contract therefor, is not sanctioned by the laws of this state, although it may be the mercantile method.

Do the sections of the code above referred to provide for the computation of interest on these notes after maturity with annual rests? We think clearly not. Section 8304, G. C., provides, "That upon judgments and decrees rendered on any bond, note," etc., interest shall be computed till payment, at the rate specified in such instrument. Not expressly providing that the rate on such bond or note shall be the same after maturity of the note as before. In the case of *Hunter v. Hall*, 14 C. C., 425 (6 O. C. D., 366), the court gives this construction of the statutes. We find no conflict of the authorities on this question. The general principle is laid down in 22 Cyc., page 1483, and some authorities are cited although they are not numerous. One of the leading cases is *Wheaton v. Pike*, 9 R. I., 132, the syllabus of which is as follows:

"Where a promissory note is made payable at any time given after date, with interest payable semi-annually, interest may be computed in making up the judgment on all installments of interest overdue and remaining unpaid, but no installments of semi-annual interest will be considered as due after the maturity of the note because after that both the accruing interest and the principal are due not on any particular day but every day till they are paid."

Our Supreme Court in *Marietta Iron Works v. Lottimer*, 25 O. S., 621, holds that inasmuch as the statute provided that upon all judgments on such notes interest should be computed till payment at the rate specified in the note, the inference is irresistible that the note after maturity and before judgment must bear a stipulated rate; thus so construing the statute as to uphold that notes shall bear the stipulated rate of interest after maturity. Such rate is not usurious but by virtue of the same provisions of the statute the Supreme Court in this same case held that while the judgment would bear the rate of interest stipulated in the contract, the interest could not be made pay-

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able quarterly until paid although such payments were also stipulated in the contract, holding that the judgment only drew interest by operation of law, and that in the absence of statutory provisions on the subject the interest on the judgment could not be computed with quarterly rests.

The holding in this case would seem by its reasoning to be conclusive of the question before us, there being no statutory provisions for computing interest on notes after their maturity with annual rests.

And in the case of *Magnester v. DeHavens*, 52 S. W., 795, by the Supreme Court of Kentucky, 1899, the syllabus is as follows:

“A stipulation in a note for payment of interest semi-annually extends only to the maturity of the note, and after that interest must be computed in the ordinary way.”

To the same effect is *Havey v. Edmison*, 22 N. W., 594. In this case the Supreme Court of Dakota reviewed many authorities on questions of computing interest. Judge Longyear of the United States District Court of Michigan holds the same rule under the Michigan statutes which he quoted and which is quite similar to the Ohio Statute so far as this question is concerned. In his opinion he says:

“The interest up to the maturity of the debt had been paid, and the only interest in question here is such as had accrued after that time by operation of law and not by any provision of a contract. It was therefore not due by installments but, it was due at any and all times as it accrued.”

The Supreme Court of New Hampshire in the case of *Ashuelon Railway Co. v. Elliott*, 57 N. H., 397, holds that interest after maturity and recoverable by way of damages for the detention of money should be computed without semi-annual or other rests.

Hall v. Scott, 13 S. W., 249, decided by the Supreme Court of Kentucky, 1890, confirms the same rule as to computing interest. We also call attention to the case of *Ingram v. Scattergood*, 15 C.C.(N.S.), page 93. This is a well considered case, and many of the authorities which we have cited are very ably and thoroughly discussed in the opinion of the circuit

court in these cases. We have not been able to find any authorities holding a different rule.

While we are aware that the commonly accepted merchantile method in computing interest upon notes of this character is to compute it with annual rests without respect to whether the note is due, or not due. While this method is the common practice, it is not the law in Ohio. Notes of this character when computed by the commonly accepted mercantile method are liable to consume everything above ground and then eat down through sub-soil to the trenton rock itself.

We are, therefore, constrained to hold that the plaintiff is entitled to have the interest on this note computed after maturity at the rate specified therein, 6 per cent., without annual rests, and computing the note upon this basis we find to be due thereon, upon the 24th day of September, 1917, which was the first day of this term of the court, the sum of \$3,081.50, and the plaintiff is entitled to judgment for this amount and a decree for foreclosure and sale of the premises described in the plaintiff's petition is hereby rendered.

**LIABILITY FOR DAMAGE TO PROPERTY RESULTING FROM A
DEEP EXCAVATION FOR A SEWER.**

Superior Court of Cincinnati.

MARY BRINKMEIER v. CITY OF CINCINNATI.

Decided, March, 1917.

Excavations—City Not Liable Where Made in a Street to a Depth of More Than Nine Feet—Sewer Held to Have Been Built by an Independent Contractor, and Not by the City—And an Abutting Owner Suffering Damage Must Look to the Contractor.

1. A municipal corporation does not possess such ownership in the streets as to render it liable, under the provisions of Section 3782, for damage to "any wall, house or other building" from an excavation in a street to a greater depth than nine feet.
2. The evidence in the case at bar leads to the conclusion that the sewer in question was built by an independent contractor, and

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in the absence of evidence of negligence on the part of the city no liability arises against the city on account of damage resulting to abutting property from excavating a trench to a depth of eighteen feet and carelessly refilling it after the sewer had been laid.

Heilker & Heilker, for plaintiff.

Charles A. Groom, City Solicitor, and *Saul Zielonka* and *Chas. Tatgenhorst*, Assistant City Solicitors, contra.

MERRELL, J.

The plaintiff alleges that she is the owner of certain property abutting on Baltimore avenue in the city of Cincinnati, and that her property is improved with two brick dwelling-houses; that the city passed the necessary legislation to improve Baltimore avenue by constructing therein a sewer; that the city proceeded to construct the sewer in the fall and winter of 1913-1914 "by digging a trench in said Baltimore road to the depth of about eighteen or more feet in front of the plaintiff's property, and that after laying said sewer in said excavation, filled the same with loose frozen earth without ramming or packing same." It is then charged that by reason of "said negligent manner of performing said work the plaintiff's houses and the ground upon which they stand was caused to slip." The answer admits the passage by the city of the necessary legislation for construction of the sewer and then denies generally.

At the trial the plaintiff showed by numerous witnesses that Baltimore road is built along the hillside, the ground occupied by plaintiff's houses ascending to one side and the ground on the other side descending to a ravine; that Baltimore avenue has been in the present location for perhaps fifty years, and that to the knowledge of old residents in that neighborhood the ground there has never slipped before. Further, that the sewer trench was dug during cold, wintry weather; that the earth tossed up from the trench froze as it lay upon the street; that when the trench came to be back-filled the frozen earth was tossed in, together with snow and slush; that the sides of the trench at certain points caved in because of the cold and wet weather and because of insufficient sheeting; that the back-filling

of the trench was most inadequately rammed; that the back-filling sank very rapidly; that in the spring following the building of the sewer the whole roadway sank very rapidly, and that large cracks developed in the hillside, extending through the plaintiff's buildings, which were caused to settle and the walls of which parted in places by as much as two or three inches. Upon the foregoing testimony the inference is strong that the damage to the plaintiff's houses was the direct result of the negligent manner of back-filling the trench.

In addition to the evidence noted, the plaintiff, before closing her case, introduced the contract between the city of Cincinnati and the Connolly Construction Company, to which was awarded the work of building the sewer. At this point, the defendant interposed a motion to instruct a verdict for the defense.

Upon this motion only two points need be considered. On the part of the plaintiff it is contended that apart from negligence, in the absence of any proof of negligence, the plaintiff is entitled to recover by virtue of General Code, Section 3782, which provides that if "the owner or possessor of any lot of land in any municipality digs * * * to a greater depth than nine feet below the grade of the street or streets on which said lot or land abuts or * * * below the established grade of the street * * * and by said excavation causes any damage to any wall, house or other building upon the lots adjoining thereto, such owner or possessor shall be liable in a civil action to the party injured to the full amount of such damage." It is the contention that the city is the owner of its streets and that as such is liable to an abutting owner for damage arising from an excavation deeper than nine feet.

However, a careful reading of the entire statute convinces me that the legislative intent was not to include a municipal corporation as to its ownership of the streets themselves. Reference is clearly had to a lot abutting on a street, and it seems to me to require a very forced construction to include in the foregoing phrase the street itself. Again, the damage of which the statute speaks is damage to a "lot adjoining," a phrase which connotes a lot next to another lot and not a street upon which lots abut. The statute might be further discussed with

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a view both to its technical implications and the ordinary and customary understanding of its phrases. I content myself with the opinion above expressed, which happens to be that voiced many years ago by this same court in the case of *Allison v. Cincinnati*, 13 Dec. Rep., 1010, 2 C. S. C. R., 462.

Of more importance and of more difficulty is the contention on behalf of the plaintiff that by the terms of the city's contract with the construction company the city retained such control over the work as that the workmen employed by the contractor are to be considered as the servants or agents of the city rather than as the servants or agents of an independent contractor. The determination of this question is one that must be made by the court and by the court alone, at this or some other stage of the proceeding. This is so because the determination involves the construction of the written contract in evidence.

This I have examined with much care and have endeavored to separate out the various clauses which might be thought to place in the city the right to control the work. Among other expressions are found the following: "The contractor engages to do the work * * * under the direction of and to the satisfaction of the director of public service;" "subject to such changes as may be made from time to time by the director of public service;" "the work shall be commenced at such time as shall be designated by the chief engineer;" "the contractor must be on the work or have a competent foreman or superintendent to whom orders and instructions can be given;" (these if given to the foreman) "would have the same force as if given directly to the contractor;" "incompetent, unfaithful, disorderly workmen or foremen will not be permitted and such will be immediately discharged upon complaint of the engineer or the inspectors;" "when in the opinion of the director of public service public necessity requires it, or when the weather is unsuitable the director of public service may suspend the work for a reasonable time."

And the following: "When the nature of the soil or other circumstances are such as in the opinion of the engineer to render it advisable to leave more bracing in the trench, such

shall be done to the extent deemed necessary by the engineer." This clause of the specifications is the only one that can be said to leave to the city, through its proper officials, control of the *manner* of doing the work. This clause, upon its face at least, might bring the present case within the authority of *Stork v. Philadelphia*, 199 Pa. St., 462, wherein negligence in not shoring up the foundation of the plaintiff's house where a subway was being constructed adjacent to it by the city for a railroad, was held to be the negligence of the city, it appearing that the city retained the right to determine when shoring up of foundations should be done. In the case cited, the city's control as to shoring was clearly retained by the city for the purpose of protecting neighboring properties, whereas the clause of the specifications here in question might be thought to look merely to the proper construction of the sewer itself. However, whether or not any such distinction be tenable, it suffices for the present purposes to note that the petition does not allege as a ground of negligence that insufficient shoring was used or that the city engineer was negligent in not ordering additional bracing, the sole charge of negligence and the emphasis of the plaintiff's testimony being directed to the character of the back-filling.

Referring now to the other items of the contract here in question, it may be said generally that the director of public service and the city engineer or the inspector on the work have reserved to them apparently certain functions. Upon analysis, however, it will be found that these functions are such as every owner of work under construction may properly exercise apart from contract. The independent contractor does not cease to be "independent" because he may have his attention called by the owner or the owner's representative to the specifications for the work or to a failure to live up to the specifications. In every contract involving construction, it is the right of the owner or of the owner's representative, and sometimes also his duty, to point out to the contractor or the contractor's workmen some defect in actual construction or some failure to live up to a specified requirement. In such case the owner or his representative commonly orders the contractor to do the work in the way specified, or, in the absence of specifications, in a workman-

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like manner. Such an order is, in truth, not an order which the contractor or workman is bound to obey—it is rather a statement by the owner or his representative that unless the work is done as specified or in a workmanlike manner the contractor will not be paid and a breach of contract will be declared. For example, in the case at bar, the contract provides that incompetent workmen shall be discharged by the contractor upon complaint of the engineer or the inspector. This clause does not give the engineer or inspector control over the workmen upon the sewer, for if complaint were made and the contractor failed to discharge the men, the contractor would doubtless recover full compensation if he could establish that the work had been done as contracted for. Even this provision therefore, when analyzed, amounts to little if anything more than the right which any owner would have if the contract specifications were silent upon the point.

Many of the items in the specifications here in question might be separately considered and their intent analyzed in the light of the authorities. As to these items, however, it will be convenient to refer to the text and notes of *Moll on Independent Contractors*, pages 43-47 inclusive. Manifestly, of course, the question for determination here can not be solved in any case by considering isolated items of the specifications one by one and apart from the contents. The work of construction which such a question commits to the court, must be done with a view to the meaning of the contract as a whole. Considering the contract here involved by this process, and also analyzing the terms of the specifications conceivably most favorable to the view of the plaintiff, I am forced to the conclusion that the contract establishes that the sewer was built by independent contract. It follows that the responsibility for negligence in the work of sewer construction is the responsibility of the contractor and not that of the city itself.

The conclusion indicated that the work here in question was that of an independent contractor is not in conflict with the case of *Morrissey v. City of Cincinnati*, 14 C.C.(N.S.), 19, wherein the contract considered read: "The work to be commenced at such time after the date of contract as the Board of Public Serv-

ice may order, and carried on in such places and *in such manner* as the engineer or inspector may direct." The decision in the Morrissey case rests upon the words above underlined, and follows the almost universal line of authority. In the contract here in question it does not appear that the city retained any control of the manner of doing the work, except such control as every owner has by way of insisting upon a performance of the specifications.

It is true, of course, that the city officials, by insisting upon a strict compliance with the specifications for this sewer work, might have obviated the damage to the plaintiff's houses, but this same ability to obviate consequential damages is present in practically every case of construction work. It follows, therefore, to make the owner responsible to third persons for the owner's failure to insist upon a strict compliance with the contract, would do away entirely with the doctrine of an independent contractor, which is firmly intrenched in the law of this state.

The plaintiff, in proof of her case, has shown damages to her buildings, but there is no proof of damage to her property considered apart from the improvements thereon. It follows by the doctrine of the Keating case, 38 O. S., 141, that there can be no recovery in the absence of proof of negligence on the part of the defendant. It follows, also, that the negligence proved being that of an independent contractor and not that of the defendant, a verdict must be instructed for the defendant. The foregoing decision is thought to be necessitated by the cases of *Cincinnati v. Penny*, 21 O. S., 499; *Keating v. Cincinnati*, 38 O. S., 141; *Cummings v. Toledo*, 12 C. C., 650, the authorities hereinbefore cited, and many others.

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**INVALID MUNICIPAL PROVISION RELATING TO THE
SALE OF BREAD.**

Common Pleas Court of Lucas County.

CLARA ALLION V. CITY OF TOLEDO.

Decided, September 1, 1917.

Constitutional Law—Exercise of Police Power Unwarranted—Where Embodied in Provisions Which Are Unreasonable, Arbitrary and Capricious—Abridgement of Rights and Interference With Freedom of Trade by the Toledo Bread Ordinance.

The Toledo bread ordinance is invalid and unenforcible in so far as it attempts to penalize the making and selling of bread in loaves weighing less than one pound avoirdupois.

Among the authorities referred to by counsel for the plaintiff in error in the following case, and not referred to by the court in his opinion, were—

Collins v. Hatch, 18 Ohio, 523; Bauer v. Casey, 16 C. D., 598; State, ex rel, v. Lynch, 88 O. S., 71, syl. 2; Fitzgerald v. Cleveland, 88 O. S., 338, 348 bottom of page; McQuillian on Mun. Corps., Section 895, et seq.; Williams v. Preslo, 84 O. S., 328; Cox v. R. R., 1 O. N. P., 213; Markley v. State, 21 C. D., 225; Ry. v. City, 10 N.P.(N.S.), 161; Yeazell v. State, 40 Bull., 63; Heming v. Cleveland, 3 W. L. M., 46; Solomon v. State, 11 O. N.P.(N.S.), 525; Sipe v. Murphy, 49 O. S., 536; City of Chicago v. Netcher, 183 Ill., 104 (48 L. R. A., 261); City of Buffalo v. Collins Baking Co., 57 N. Y. Supp., 347; People v. Gillson, 109 N. Y., 345; Slaughter-House Cases, 16 Wall., 87.

George A. Bassett, for the plaintiff in error.

Charles T. Lawton, contra.

RITCHIE, J.

Error to the police court of the city of Toledo.

On the 30th day of July of this year there was filed in the police court of this city an affidavit, charging that on that day and in this city Clara Allion (the plaintiff in error) "did sell to L. H. Becker one loaf of bread, which said loaf of bread did then and there weigh less than one pound avoirdupois, to-wit,

eleven and three-quarters ($11\frac{3}{4}$) ounces and no more, contrary to the form of the ordinance in such case made and provided."

After arrest had been made, and at the hearing in the police court, the defendant filed, successively, a motion to quash and a demurrer to the affidavit, in each of which the validity of the ordinance upon which the prosecution was founded was attacked. Both the motion and the demurrer were overruled by the police court, and exceptions taken. The case then proceeded to trial upon the testimony of witnesses and resulted in a judgment of conviction of the defendant, who was sentenced to pay a fine of \$10 and the costs, taxed at \$4.62. A motion in arrest of judgment, then filed, was overruled, a bill of exceptions was presented to and allowed by the court, and this proceeding in error is now prosecuted in this court for the purpose of reviewing the judgment of the police court.

The ordinance upon which the original prosecution in the police court was founded was passed on the 28th day of May, 1917. It is entitled: "Ordinance No. 933, Regulating the size of the loaves of bread to be sold within the city of Toledo." In its different sections—six in number—it provides, in substance, that all bread made or procured for the purpose of sale, sold, offered or exposed for sale, shall be made in a clean and sanitary place, of good and wholesome flour or meal, and shall contain no deleterious substance or material; that every loaf of bread shall weigh a pound avoirdupois (except as in the ordinance provided) and that such loaf shall be considered the standard loaf in the city of Toledo; that bread may be made or exposed for sale in 1, $1\frac{1}{2}$, 2, $2\frac{1}{2}$, 3, $3\frac{1}{2}$, 4, $4\frac{1}{2}$, 5, $5\frac{1}{2}$ or 6-pound loaves, *and in no other way*; that every loaf of bread shall have affixed thereon, in a conspicuous place, a label, printed of a certain size and type, giving the weight of the loaf, *marked in terms of pounds*; that in no instance shall the weight of the loaf be stated in *ounces*; that the business name and the address of the maker, baker, or manufacturer of the loaf shall also be placed upon such label; that there shall be kept, in a conspicuous place in the bakery, bake shop or store, by the proprietor thereof, and every seller of bread, scales and weights suitable for the weighing of bread, and that the bread shall, by the seller, be weighed

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in the presence of the buyer whenever so requested by the latter; that for the violation of any of the provisions of the ordinance there shall be imposed a fine of not less than ten nor more than one hundred dollars for each offense. The ordinance further provides that its provisions shall not apply to what is commonly known as stale bread, provided that at the time of the sale the seller of the bread shall expressly state to the buyer that the bread so sold is stale.

One contention of the plaintiff in error is that the ordinance is contrary to law because it contains more than one subject. Section 4226 of the General Code provides: "No ordinance, resolution or by-law shall *contain more than one subject*, which shall be clearly expressed in its title." Section 38 of the charter of the city of Toledo provides: "Each proposed ordinance or resolution shall be introduced in written or printed form, and shall not contain more than one subject, which shall be clearly stated in the title." As the court has already stated, the title to this ordinance reads: "Ordinance No. 933. *Regulating the size of loaves of bread to be sold within the city of Toledo.*"

It will be noticed by what the court has already said as to the provisions of the ordinance in question here that it does provide for many matters—clean and sanitary place where bread shall be made—bread to contain no deleterious substance or material—label upon the loaf—name and address of maker—scales for weighing, weighing by seller in presence of buyer when required—and the exception as to sale of stale bread, etc.—none of which at all pertain to the subject clearly expressed in the title to the ordinance, to-wit: "*Regulating the size of loaves of bread to be sold within the city of Toledo.*"

In the judgment of the court, there is much of force in the contention of the plaintiff in error already stated. Because, however, of the court's opinion of the ordinance, based upon another clearer and less doubtful reason, it becomes unnecessary to pass upon (and the court does not now do so) the first contention of the plaintiff in error.

The real question at issue, as presented by the record in this proceeding is: Have the bakers of Toledo the right to make, and the dealers in bread the right to sell, in Toledo, a loaf of bread

weighing *less than* one pound if they so choose or trade and custom demands it?

If they have not, then the city council can, by ordinance, say to the grocer, "You can not, in Toledo, sell or expose for sale less than one bushel of potatoes"; to the milkman, "less than one quart of milk"; to the butcher, "less than one pound of meat"; to the merchant, "less than one yard of calico," etc. What the city council has, by this ordinance, said to the baker can it not, with equal right, say to the butcher or the candlestick maker?

What general powers do municipal corporations possess? Only such as are expressly conferred or those which are implied as being necessary to the exercise of the powers which are conferred expressly.

It is not claimed that any general power has been, by *statute* of the *state*, conferred upon the council of the city of Toledo which authorizes the ordinance in question here.

Section 3 of Article XVIII of the amendment to the state Constitution, adopted September 3, 1912, provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits, such local police, sanitary and other similar regulations *as are not in conflict with general laws.*"

Article I, Section 1 of the Constitution of the state of Ohio provides:

"All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and seeking and obtaining happiness and safety."

Article XIV, Section 1 of the Constitution of the United States provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

The claim of the plaintiff in error is that the ordinance in question violates the foregoing provisions of the state and fed-

eral Constitutions, and that the ordinance can not be upheld, unless it is under the police power of the state or municipality.

While under this so-called police power the welfare of the public is at all times paramount, and the right of the individual to life, liberty and property must yield to the rights of the public still, under the police power, this ordinance can not be upheld if it is unreasonable, arbitrary, or capricious. If the provisions of the ordinance make an arbitrary interference with the right to contract or carry on business and has no just relation to the protection of the public the ordinance is invalid. *McLean v. Arkansas*, 211 U. S., 539.

In the case of *In re Steubs*, 91 O. S., 135, where the defendant was convicted of selling potatoes by the peck instead of avoirdupois weight as required by statute, and where the Supreme Court held the statute invalid, the court, on page 140, say:

"While it is within the power of the state to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good, yet in providing means for such purpose the provisions made must be reasonable."

In the case of *State of Ohio v. Boone*, 84 O. S., 346, the court, on page 351, says:

"While, therefore, a broad discretion is given to the Legislature to provide for the general welfare it necessarily is not an arbitrary or unlimited discretion; for if it were beyond judicial control or review it would amount to a practical abrogation of all constitutional guarantees of personal rights, and the undefined boundaries of legislative powers could be extended so as to authorize the worst and most impossible form of despotism—a legislative despotism conducted in the name of the people."

In the instant case the evidence, undisputed, shows that the plaintiff in error has for some time been engaged in the "home bakery" business in this city, and without help or assistance from any one and solely by her own efforts, doing her own baking and making her own sales, her daily output has averaged about one hundred loaves of bread. Up until the month of April of this year all the loaves were small ones—5 cent loaves. Since that time she has made and sold daily from 70 to 80 so-called

small loaves at 6 cents each. The loaf of bread sold to the complaining witness—an officer in the department of health—weighed $11\frac{3}{4}$ ounces. Such loaves of bread were sold by the plaintiff in error, as this loaf was, for 6 cents. A larger, or one-pound loaf, was uniformly sold at 10 cents. In selling a loaf weighing $11\frac{3}{4}$ ounces, the plaintiff in error, so far as the value of the bread was concerned, was really giving more than was required of her.

The only offense charged against the plaintiff in error is that of selling a loaf of *bread weighing less than one pound avoirdupois*. There is no charge of short weights, lack of sanitation, use of inferior or unwholesome flour, or the violation of any of the provisions of the bread ordinance except as before indicated.

How can the forbidding of the making or selling of a loaf of bread weighing less than one pound inure to the welfare, the health or the morals of a citizen? Is such a reasonable provision? There can be no claim made that bread weighing less than a pound is injurious to health. The ordinance expressly provides that it does not pertain to stale bread. If stale bread weighing less than a pound is not injurious, certainly new, fresh bread weighing less than a pound is not injurious. Does the limitation in weight provided in the ordinance give any advantage to the public on the ground of economy? In fact, there is offered a chance for greater economy for the small family, or the workman who carries his luncheon, by buying a small loaf rather than a larger one, on account of the waste.

In the case of *Buffalo v. Collins*, 57 N. Y. Supp., 347, the syllabus reads:

“An ordinance regulating the weight of bakers’ bread is void, as being an unreasonable invasion of the right to engage in a lawful business.”

The attention of the court has been called to the case of *Schmidinger v. City of Chicago*, 226 U. S., 578, decided January 13, 1913, in which an ordinance fixing the standard weight of loaves of bread has been held valid, and the claim is made that the Toledo bread ordinance is copied from the Chicago ordinance. This court has examined both of these ordinances with care. Their

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provisions are very like in many particulars, but unlike in one matter of importance; and if, as claimed, the honorable architect of the Toledo ordinance did copy from the Chicago ordinance, he stopped copying too soon. The Chicago ordinance fixes the standard weight of a loaf of bread at sixteen ounces, and other *half, three-quarter, double, triple, quadruple, quintuple, or sextuple* loaves. Had the Toledo ordinance, instead of forbidding the making or selling of bread weighing less than one pound, fixed the standard as in Chicago, and permitted the making and selling of bread in multiples or in a fractional part of a pound, the ordinance, in all probability, would not now be before this court for review.

After a full and careful consideration of this case and an examination of the many cited and other authorities, this court holds the Toledo bread ordinance, in so far as it penalizes the making and selling of bread weighing less than one pound avoirdupois to be invalid and void. Bread of the same composition weighing less than a pound is equally wholesome with a loaf weighing a pound. There is a demand for loaves of less weight than a pound.

At the time of her arrest the plaintiff in error was engaged in a proper and lawful business—supplying the needs of people daily, at a moderate charge, without any criticism as to the quality of the bread furnished or its wholesomeness.

Everybody has the constitutional right to use his or her faculties in all lawful ways, to live and work where he or she will, to earn a livelihood in any lawful calling, and to pursue any lawful trade or avocation. There was no necessity for the common council of Toledo, in providing for the public welfare, to prohibit, interfere with or limit the plaintiff in error and others in the carrying on of the bread business. Its endeavor to do so, by that part of the ordinance in question here, is an unreasonable prescription of a legitimate calling, without any benefit accruing to the people of this city. The so-called police power has too often been made to cover a multitude of legislative sins, but is ought not to be allowed to be used as a vehicle in which to ride over the constitutional rights of citizens. It has been held, not only in this state, but in a great number of cases in both federal and

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state courts, that it is within the judicial power to declare void an unnecessary and unreasonable exercise of the police power. *State v. Boone*, 84 O. S., 351; *Phillips v. State*, 77 O. S., 214.

From the foregoing it follows that this court finds prejudicial error in the record, judgment and proceedings of the police court, and the judgment of that court is reversed at the costs of the defendant in error, and the plaintiff in error, Clara Allion, is discharged. •

**RECEIPT OF INDUSTRIAL INSURANCE DOES NOT REDUCE
AMOUNT RECOVERABLE FROM A
TORT FEASOR.**

Common Pleas Court of Clark County.

GERTRUDE E. BRUNK, ADMINISTRATRIX, v. THE CLEVELAND,
CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, January 14, 1918.

Evidence—As to Receipt of Compensation from the State Insurance Fund—Not Competent in Fixing Damages to be Awarded Against a Tort Feasor—Nature of Industrial Insurance.

The compensation provided by the workmen's compensation law of Ohio to injured employees or the representatives of those who are killed in the course of their employment is in the nature of occupational insurance, and like general insurance can not be deducted or treated as an offset to a claim for damages for wrongful injury or death; and it follows that it is not error to exclude from consideration by a jury, in an action for damages for injury or death against a tort feasor, the fact that compensation has been accepted from the state insurance fund.

Donald Kirkpatrick, John L. Zimmerman and H. C. Cory, for plaintiff.

J. E. Bowman and Paul C. Martin, contra.

GEIGER, J.

The plaintiff sued to recover on account of the death of her decedent in a railroad crossing accident on West Main street in the city of Springfield.

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The decedent, at the time of his death, was a motorman operating as such a car of the Springfield Street Railway Company. At the point of the accident the street railway company's tracks crossed the main line of the defendant, the C., C., C. & St. L. Railway Company.

At the time of the accident, the street railway company's car, in charge of the decedent and a conductor, approached and passed upon the track of the defendant. Before the car had gotten over the track, it was struck by a west bound freight train of the defendant company, and the motorman was killed.

At the time of the accident, the street railway company had complied with the laws of Ohio, and was insuring its employees under the provisions of the Ohio workmen's compensation act, and after the death of the decedent his representatives received \$3,000, as compensation for his death, under the provisions of said act, and released the street railway company from all further liability.

The defendant railway company, in its answer, set up the fact that the plaintiff, the wife of the decedent, has accepted compensation for the death of the decedent, and asserted that it had thereby been released from any claim for damages for any negligent act upon its part, that might have been the proximate cause of the death.

To this answer, a demurrer was interposed and the same was sustained on the reasoning of the following cases. *Vayto v. Railway Co.*, 18 N.P.(N.S.), 305; *Biddinger v. Steininger-Taylor Co.*, 18 N.P.(N.S.), 42; *Kenning, Admr., v. Railway & Terminal Co.*, 18 N.P.(N.S.), 526.

It is held in the Biddinger case, that:

"An employee who has been injured or the personal representative of an employee who has been killed in the course of his employment, after having applied for and received an award under the workmans' compensation law, and after such award has been paid in full, may maintain an action against a stranger for damages for negligently causing the same personal injury."

In the Vayto case it is held that: .

"The workmans' compensation acts in no way or in any manner, or in any sense, take away the right to sue and recover dam-

ages from a person other than his employer, who may have negligently inflicted injury upon him while in the course of his employment."

In the Kenning case, it is held that:

"When a workman has been killed by the actionable negligence of a third person, the fact that his personal representative has already received payment from the state insurance fund under the workmans' compensation act, will not prevent such representative from maintaining an action against the tort-feasor for damages for causing the death, nor will the fact that he tort-feasor himself contributes to the state fund affect his liability."

See, also, *Newark Paving Company v. Klotz*, 85 N. J. L., 432.

The above cited cases are well reasoned and strongly support the conclusion stated.

After the demurrer had been sustained, the case came on for trial upon the amended answer, which omitted the objectionable defense.

Upon the trial, the administratrix, the widow of the decedent, being upon the stand, a question was propounded to her by which it was sought to bring before the jury the fact that she had already been compensated in the sum of \$3,000 out of the state fund, for the death of her husband, on account of his employment by the street railway company.

The court sustained the objection to this question, and counsel for defendant read into the record what they expected the answer of the witness to disclose.

The jury returned a verdict in favor of the plaintiff for the sum of \$6,000, and a motion is made for a new trial.

It is conceded by the defendants that the receipt of compensation from the street railway company under the employers' liability act is not a bar to the action against the C., C., C. & St. L. Railway Company; but it is insisted that the fact of the receipt of such compensation and the amount thereof is proper to be considered by the jury on the question of the amount of damages, counsel contending that this case is governed by a different principle from that applying to the case of private insurance, in that the contract of private insurance is *res inter alios acta*, something with which the defendant railway company

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had nothing to do, and from which it can claim no advantage, while the statutory compensation under the employers' liability act is a matter to which all members of the public, including the railway company, are parties, and the burden of which falls upon the public as a whole, including the railway company.

Workmen's compensation laws are now in force in thirty-seven states and three territories of the United States. There is also a federal act on the same subject.

In the statutes of all the states, with the exception of those of Arizona, New Hampshire, Ohio and West Virginia, as well as in the federal act, there are provisions for the adjustment of rights where the injury is caused by a third person.

The provisions are not uniform. Some permit the injured party to proceed against the fund and the third party, but deny the right to both compensation and damages; some subrogate the one who pays the compensation to the rights of the injured party; some provide that the receipt of compensation shall constitute an assignment of the claim to the party paying the compensation, and some provide that an election to sue for damages operates as a waiver of a claim for compensation. The federal act provides that where a right of action exists against a third party, the employee, as a condition to compensation, may be required to assign his right to the commission, which may then prosecute or compromise the claim, and hold the amount collected, paying over to the employee any surplus over the amount of compensation. If the employee collects upon any claim, the amount so collected shall be credited against the compensation provided by the act. The English act provides against double recoveries by allowing the employee to proceed against both the employer and the third person, but prohibits recovery of both damages and compensation.

It thus appears that out of forty-two different enactments of various states and governments, thirty-eight provide for some adjustment where the injury is caused by a third party, which limits the injured party to a single recovery.

It may, therefore, with some justice, be insisted that our statutes should not be so construed as to permit a recovery of double damages for a single wrong, as being in conflict with the almost unanimous judgment of legislative bodies.

However, courts are not permitted to make laws, but only to interpret them. The failure of the Ohio Legislature to cover this point may have been an unfortunate oversight, or an intentional omission.

We can not consider the legislative enactments of other states, but must rely upon principles of common law for a solution of the question.

In West Virginia alone of the four states which have no statutory provisions has a Supreme Court passed upon this point. In *Mercer v. Ott*, 89 S. E., 952, decided in 1916, and *Merrill v. Marietta Torpedo Company*, 92 S. E., 112, decided in 1917, the Supreme Court of West Virginia holds that if the injury is caused by the negligence of a third person, the right of the injured party to compensation out of the fund is not thereby affected, nor is his right of action against such third person impaired.

It is held that the provision of the act is in the nature of life and accident insurance, or of a pension, and that the injured party is entitled to both compensation under the act, and full damages from the third party causing the injury. In the absence of a statutory provision in Ohio, we may gain further light from an examination of cases involving insurance and pensions, as well as of those construing the statutes permitting a recovery for wrongful injury or death.

That insurance on the life of a decedent, received by his representatives, can not go to mitigation of damages arising from the wrongful act which resulted in his death, is uniformly held. See 13 Cyc., 70, and cases cited; *Southerland on Damages*, Volume 1, Sections 157-158; *Brabham v. B. & O. Ry. Co.*, 220 Federal, 35; *Houston v. Lemayor*, 119 S. W., 1162.

This is conceded to be the law in the case of *Davis v. Guarneri*, 45 O. S., 470.

It is, however, insisted by counsel for defendant that the principles applicable in cases of insurance do not control the case at bar, for the reason that the compensation paid under the employers' liability act is not the result of the decedent's personal act for his own protection, but is the payment out of a fund provided by law, and which is a burden upon the general public, including the defendant railway company.

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In the case of *Railway Company v. Maddry*, 57 Arkansas, 306, it is held that the provisions of the federal law providing for a pension for the widow and minor children of a deceased pensioner should not be considered in mitigation of the damages sustained by them by reason of the death of the pensioner.

The court reaches its conclusion in that case largely on the authority of insurance cases, and specifically cites the case of *Davis v. Guarnieri*, *supra*.

While the question now raised by counsel, that the compensation paid is a general burden upon the public, was not specifically raised in that case, yet it was held that a government pension, which necessarily is a burden upon the entire public, can not be considered in mitigation of damages.

In the case of *Geary v. Metropolitan Street Railway Company*, 77 N. Y. S., 54, it is held that in assessing damages for the death of one employed in the city fire department the jury should not consider the pension his widow is receiving from the city.

It appeared that the decedent was earning a salary of \$1,400 per annum, and under the pension law of the city of New York his widow, at the time of the trial, was receiving \$700 per annum.

The trial court instructed the jury that in assessing the damages they should not take into consideration this pension, and the reviewing court held that such instruction was proper, stating that it was the duty of the jury, under the statutes, to ascertain the pecuniary loss which the widow and children sustained by the death of the husband and father, and that any benefits which they received by way of insurance or pension are not to be offset or deducted.

The court says:

“The inquiry is, what amount of money would they have received from or through him had he lived, and it in no manner involves the consideration of what they have received on account of his death.”

This case applies the rules in reference to general insurance to compensation received as a pension from a fund raised from taxation of the general public.

The case of *Boulden v. Pennsylvania Railway Company*, 205 Pa. St., 264, holds that in an action against the railway com-

pany to recover damages for the death of an employee, who was also a member of the relief department of the company, the defendant will not be permitted to show in mitigation of damages that the mother of the deceased, as the latter's death beneficiary, received benefits from the relief department.

A case in Ohio that may throw some light upon the question is that of *Davis v. Guarnieri, supra*. In that case the plaintiff was the administrator of his deceased wife, and brought an action for her wrongful death, but before trial re-married, and it was claimed by counsel for defendant that the fact of his re-marriage should go to the mitigation of damages for the loss of his former wife, and the court held that evidence that he had again married, and that his second wife performed like services and contributed in like manner as the first wife to the support of the family was not admissible in mitigation of damages.

The court, in substance, holds that the plaintiff in his representative capacity was entitled to recover for the loss of the services of his wife, and that the defendant could not plead in mitigation that that loss had been repaired in part, and points out that the claim of the defendant to a mitigation of damages is in the nature neither of a set-off nor counter-claim. The case holds that the right of action is complete at the time of the death, and the recovery is not to be diminished by any partial compensation the plaintiff may have received subsequent to the death.

The court is convinced that the compensation provided by the workmen's compensation act is in the nature of occupational insurance, and that the same rule which is applicable to general insurance is applicable to the payment of compensation under the act, the act being silent on this point.

The statutes having given a right of recovery to personal representatives of the decedent for loss caused by his death, the fact that some beneficiary of the decedent has been compensated, in part, under the provisions of the workmen's compensation act, is not proper to be considered by the jury in mitigation of damages in an action against a tortfeasor, even though the fund out of which the compensation was paid be a general burden on the public, including the defendant in this action.

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The burden borne by the general public is only that of administering the fund, and the fund itself arises from payments made by employers (Section 1465-69, General Code). But the conclusion would not be altered if the defendant, as an employer of labor, was a contributor to the fund, which does not appear, *Kenning v. Railway Company, supra*.

An interesting discussion of the matter, in addition to the cases already cited, may be found in an article by Ernest Angell, 13 Ohio Law Reporter, page 7.

The court is of the opinion that no error arose in excluding from the consideration of the jury the fact that the decedent's representatives had received a sum through the state fund on account of the death of the decedent.

Motion for a new trial overruled.

**COMPENSATION FOR SERVICES RENDERED BY
AN ATTORNEY.**

Common Pleas Court of Hamilton County.

KATE O'BRIEN V. D. T. HACKETT AND W. M. YEATMAN,
AS PARTNERS.

Decided, January Term, 1918.

Attorney and Client—Compensation for Services Rendered Under an Implied Contract.

The rule that an attorney may recover for services rendered with the consent and upon request of the party although not under an express contract, does not apply where the party has an attorney of her own with whom she was in communication regarding the matter in settlement, but who also received information as to the status and progress of the settlement from the client of the attorneys now seeking to charge her for services rendered in that behalf.

C. J. Fitzgerald, for plaintiff.

Hackett, Yeatman & Harris, contra.

GEOGHEGAN, J.

This case was submitted to the court, a jury being waived. It is an action for \$36.63 alleged to have been deducted by the defendants from certain moneys received by them on behalf of the plaintiff.

The defendants claim that they are entitled to retain this money as compensation for services rendered as attorneys for the plaintiff and expenses incurred in her behalf. It is admitted that there was no direct contract of employment, but the defendants claim that they were entitled to retain the sum sued for upon the familiar principle of law that it is not essential to the right of recovery by an attorney against his client for professional services that there should be shown an express request, but if the services are rendered under such circumstances as will reasonably imply that they were performed with the assent and upon the request of such party, a recovery therefor may be had.

This is undoubtedly a correct principle of law, but the circumstances of this case and the evidence adduced at the trial are not sufficient to bring the defendants within the purview of that principle. The services in this case were rendered by the defendants for persons by whom they had direct employment, who were jointly interested with the plaintiff in obtaining their respective shares of an estate in Texas. Plaintiff had her own attorneys and was in constant communication with them, although at times she received from the defendants' client information as to how the matter was progressing.

For some undisclosed reason the fund when sent to Cincinnati was sent to the defendants and by them distributed. I do not think that under the circumstances the defendants are entitled to compensation for their services. And inasmuch as the plaintiff went to the expense of sending her own attorney to Texas to make investigation with reference to the estate there, there is no reason why she should be charged with part of the expenses incurred by defendants on behalf of their clients in the same regard.

Therefore, the judgment of the court is that the plaintiff recover from the defendants the sum of \$36.63 with interest from July 1, 1914.

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State v. Ross et al.

**VALIDITY OF GRAND JURY PROCEEDINGS UNDER
EXISTING LAW.**

Common Pleas Court of Montgomery County.

STATE OF OHIO V. FRANK ROSS AND D. H. SWIN.

Decided, February 15, 1918.

Criminal Law—Indictments Under the Constitutional Amendment of 1912—Sufficient Authority Under the Common Law for Continuation of Grand Jury Proceedings—Notwithstanding Omission of Legislative Action.

Inasmuch as there has been continuous recognition of the common law grand jury from the earliest history of the state and references to a grand jury are contained in the statutes, an indictment returned since the adoption of the amendment to Article I, Section 10 of the State Constitution, in 1912, can not be considered as open to a plea in abatement because of failure of the Legislature to determine the number of persons necessary to constitute a grand jury or to concur in an indictment under said amendment.

Samuel D. Kelly and Joseph B. Murphy, Assistant Prosecuting Attorneys, for State.

Joseph W. Sharts and Mulholland & Hartman, contra.

PATTERSON, J.

The defendants in this case are under indictment for assault with intent to kill. Upon arraignment each entered a plea of not guilty with the understanding that this plea could subsequently be withdrawn for the purpose of filing any motion, plea or demurrer to the indictment. Accordingly the pleas were withdrawn and a challenge to the array of the grand jury was filed by the defendants, which was overruled by the court.

Then each defendant filed a separate plea in abatement to the indictment alleging substantially the same grounds. Issue was taken upon this plea and the matter came on to be heard by the court upon argument and briefs of counsel. Some of the grounds raised a question of fact and the others a question of

law. The grounds raising questions of fact not being supported by any evidence and not appearing to the court to be sound, were overruled at the time of presentation.

The serious question raised by the plea has reference to the claim made by the defendants that they were not lawfully before the court for the reason that they were not indicted by a lawful grand jury, because Article I, Section 10, of the Constitution of Ohio, as amended in 1912, has not been carried out. The part of the section of the Constitution referred to reads as follows:

“No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, and the number of persons necessary to constitute such grand jury, and the number thereof necessary to concur in finding such indictment shall be determined by law.”

Counsel for defendants insist this clause is mandatory, and until it has been complied with the state of Ohio is without a lawful grand jury. It is conceded that the Legislature has not acted in accordance with this amendment. The court has taken the time to read all the debates in the constitutional convention upon this section, and not one word was said in reference to this clause governing the number of the grand jury and the number necessary to return an indictment. There was considerable discussion in reference to the taking of depositions in criminal cases, and the right to comment upon the failure of a defendant to take the witness stand. Section 5167 of the Revised Statutes, which provided for the number of persons summoned to serve as grand jurors, was omitted from the jury law which was passed in 1902 (96 O. L., p. 3). However, in the same law, Section 5168 of the Revised Statutes, now 11427 of the General Code, provided for “twelve persons to serve as petit jurors, or twenty-seven persons to serve as grand and petit jurors for a special term of said court.”

We can not see any more clearly why this provision related to a special term of court instead of the general term than we can see any reason for the omission in Section 5167 above referred to.

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It is conceded that the common law grand jury consisted of not less than twelve nor more than twenty-three men. The common law grand jury has existed in Ohio without controversy ever since the Ordinance of 1787.

So, if there were no statutory authority at this time in Ohio for a grand jury, we would still have one under the common law.

In addition, however, to Section 11427 above referred to, we have two other sections in the General Code which give us the right to conclude that the Legislature had recognized the number fifteen as the number to constitute a lawful grand jury, as well as twelve to be the least number that can return an indictment.

Section 13568 provides:

“After the discharge of the grand jury the court, when necessary, may order the sheriff to call together a new grand jury from the bystanders or neighboring citizens of *fifteen* good and lawful men having the qualifications of grand jurors, who shall be returned and sworn, and proceed in the manner provided by law.”

And Section 13571 provides:

“At least *twelve* of the grand jurors must concur in the finding of an indictment, and when so found the foreman shall endorse on such indictment the words ‘A true bill,’ and subscribe his name as foreman.”

These two sections are under a chapter of the General Code which is headed “The Grand Jury and Its Proceedings.”

Section 11427 is carried into an act “To Revise certain sections of the General Code, relative to the organization, jurisdiction and procedure of the Supreme Court, the court of appeals and other courts,” which was passed by the Legislature April 29, 1913, and found in 103 O. L., page 425. This was an act of the Legislature concerning the grand jury passed since the adoption of the new Constitution. And while in this section reference is only made to a *special* term of court, we can not concede that it was intended to provide one law for the govern-

ing of a *special* term of court and leave the general term of court without any law governing the grand jury.

We do not concede that it is necessary for the Legislature to take any action in this matter for the reason that the state of Ohio, as above stated, from the time it was a territory has recognized the common law grand jury; it has been used by the courts without interruption or criticism, and has met with the general approval of the people. It has been nowhere suggested that the people at any time have been dissatisfied with our grand jury system, or with the number composing the same, or the number necessary to return an indictment. The objection raised by the plea herein possesses more shadow than substance, and no convincing reason has been presented to this court why the state of Ohio should be turned over to the law violators. If the Legislature has blundered in this matter the courts, while not attempting to legislate, will stand today, as they have in the past, for the protection of our citizens in their property and person.

Pleas overruled and exceptions noted.

SUFFICIENCY OF AN INDICTMENT COINED IN THE LANGUAGE OF THE STATUTE.

Common Pleas Court of Darke County.

STATE OF OHIO V. LAWRENCE RHOADES.

Decided, October 29, 1917.

Criminal Law—Indictment Charging Unlawful Operation of an Automobile—Language of the Statute Sufficiently Sets Forth the Nature of the Offense—Section 12603.

1. An indictment charging an offense in the language of the statute is, in general, sufficient. But where the statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment.
2. The language of Section 12603 of the General Code, making it an offense to operate a motor vehicle on the public roads or high-

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ways at a speed greater than is reasonable or proper, or so as to endanger the property, life or limb of another, etc., sufficiently defines the wrongful acts constituting the offense the accused is required to meet, and may be charged in the language of the statute.

Geo. F. Crawford, Prosecuting Attorney, for plaintiff.

Geo. W. Mannix, contra.

BOWMAN, J.

Motion to quash indictment.

The indictment charges that the defendant unlawfully did operate a motor vehicle on a public road so as to endanger the life of one True Corwin.

The offense is charged in the language of the last clause of Section 12603 of the General Code, which provides that:

“Whoever operates a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general or usual rules of such road or highway, or so as to endanger the property, life or limb of any person” shall be punished, etc.

It is urged in support of the motion that the offense defined by this statute involves a conclusion; that while a motor vehicle may not be operated at a speed greater than is reasonable or proper or so as to endanger the property, life or limb of another, no speed is prescribed nor description of an overt act, nor specification of acts, conduct or manner of operation which will have such effect, and that an indictment charging the offense in the language of the statute lacks that degree of fullness, certainty and precision necessary to apprise the accused of the exact charge against him, and to enable him to meet the same and to plead any judgment which may be rendered upon it in bar of a subsequent prosecution for the same offense.

That it is his constitutional right to be informed of the accusation, its nature and ground, see Section 10, Article I of the Constitution.

While penal statutes are to reach no further than their words, it is elementary that an indictment which charges in the lan-

guage of the statute the commission of the offense as therein defined is, in general, sufficient.

The rule is not without qualification, and where the statute creating an offense fails to set out the facts constituting it sufficiently to apprise the accused of the precise nature of the charge against him, a more particular statement of the facts will be required in the indictment.

In other words, where the statute does not sufficiently define a particular wrongful act, and give notice to the defendant of the offense he is required to meet, the statute words must be expanded by such specification in the indictment of the essentials as will define the offense with particularity. *State v. Doran*, 99 Me., 329; *State v. Mitchell*, 47 W. Va., 789, 791; *United States v. Cruikshank*, 92 U. S., 542, 558, 562; *Johnson v. People*, 113 Ill., 102; *State v. Schmid*, 57 N. J. L. (28 Vroom), 625, 627; *Joyce on Indictments*, Section 372.

The statute here has to do with the speed with which motor vehicles are to be operated upon the public roads and highways. Any speed that will endanger the property, life or limb of another, or that is greater than is reasonable or proper, having regard for the width, traffic, use and the general or usual rules of such road or highway, is declared unlawful, and is the offense defined by this statute.

The offense is sufficiently defined to convey to the mind of a person of ordinary intelligence adequate information of the evil intended to be prohibited. He is advised that the offense charged against him, if in the language of the statute, has to do with the speed with which he was operating his machine. The indictment need not, therefore, go beyond the language of the statute and specify with further particularity the details as to the precise rate of speed and the circumstances and conditions that rendered such rate of speed unreasonable, improper or dangerous. The language is clear enough to enable the jury to easily understand it, and not so vague as to mislead the accused nor embarrass him in the preparation of his defense, or expose him to substantial danger of another prosecution for the same offense.

Motion overruled.

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**LIABILITY FOR COLLAPSE OF A BUILDING UPON WHICH
FLOOD WATERS HAD ENCROACHED.**

Common Pleas Court of Hamilton County.

SOPHIA ULLAND v. THE FOSS-SCHNEIDER BREWING COMPANY.*

Decided, February, 1916.

Damages—Not Recoverable From a Property Owner—Whose Efforts to Save His Own Property—Required by Necessity During Flood Time—Resulted in Injury to the Property of a Neighbor.

During an extraordinary flood, water entered the cellars of both plaintiff and defendant, situated on adjoining property. Defendant's cellar was much the deepest and contained property of value, making it necessary to syphon and pump out the water as fast as it entered. This removed the hydrostatic pressure, and caused the adjoining wall of plaintiff's building to collapse. *Held:*

1. That in seeking to protect itself from the common menace, the defendant was not bound to permit a large body of water to remain in his own cellar and suffer serious damage thereby, in order to counterbalance the hydrostatic pressure which was being exerted on the subsoil of a neighbor who had made no effort to prevent the water entering her premises, and said defendant was not liable for the damage which resulted to plaintiff's property by reason of the water being pumped from its own cellar.
2. That the provision of Section 3782, making a landowner, who excavates upon his own property to a depth greater than nine feet below the curb of the street, liable for resulting damage to any building on an adjoining lot, is not applicable to a case of the character of the one at bar.

Powell & Smiley, for the motion.

Bettinger, Schmitt & Kreis, contra.

GEOGHEGAN, J.

Heard on motion for a new trial.

The evidence in this case disclosed that the plaintiff and the defendant were adjoining proprietors of premises on the west

*Reversed by the Court of Appeals in an unreported opinion; judgment of the Court of Appeals reversed and that of the Common Pleas affirmed by the Supreme Court February 5, 1918; to be reported.

side of Freeman avenue, south of Gest street, in the city of Cincinnati. The plaintiff's premises consisted of a two and a half story brick building upon a lot twenty feet front, lying immediately north of the premises of the defendant, which extended southwardly from the plaintiff's south line for some considerable distance and which premises were used by the defendant for brewery purposes.

The cellar under the premises of plaintiff was nine feet in depth. Immediately adjoining these premises, and under that portion of the brewery property known as the driveway, the defendant company maintained a cellar which was some eighteen or twenty feet in depth, and along the north line of said cellar and immediately adjoining the south line of the plaintiff it had constructed a stone wall. Between this stone wall and the south wall of the plaintiff's cellar was a small strip of ground, over the surface of which the tenants of the plaintiff secured access to the upstairs rooms of her building. Immediately south of the cellar under the driveway, which was referred to during the course of the trial as the driveway cellar, the defendant company had constructed two cellars, that is, a cellar and a sub-cellar. The floor of the cellar was somewhat higher than the floor of the driveway cellar, while the floor of the sub-cellar was lower. There were several other cellars in the premises of the defendant and in the sub-cellar was constructed a large well. Most of the cellars of the defendant company were lower than the level of the public sewer in Freeman avenue, and therefore it was impossible to drain the cellars into the sewer.

It was necessary in the management of the defendant's business to keep these cellars very clean, and consequently a considerable amount of water was used in washing the floors. Now, as this water could not be carried to the sewer, it was, by a system of surface drains and gutters in the various cellars, conducted to the well or tank above described, and there by means of a syphon carried out to Fillmore street, in the rear of the brewery property. In the driveway cellar, as well as in several of the other cellars, were kept large casks of beer and it was necessary that the temperature be kept at a certain degree in

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order that the beer be not spoiled. In order that the water which was used for various purposes might escape from the driveway cellar, it was carried by means of gutters in the floor to a point near the south wall of the said driveway cellar and from that point by means of an iron pipe downward into the sub-cellar next adjoining, and thence by means of gutters to the well or tank above described, and whenever this well or tank became nearly full, the syphon was put to work and the water was pumped out.

The soil of the territory surrounding and upon which the improvements of the plaintiff and defendant were placed was a sandy river deposit. The premises as they have been described had existed, prior to the time complained of in the petition, in the same state for a number of years.

About the end of March, 1913, the Ohio river was visited by a very great flood, the largest in that river for a number of years preceding, and on or about the 31st day of March, owing to the gradual rise of the river, the water was caused to back up in the various sewers and it soon began to make its appearance in the cellar of the plaintiff, as well as the cellar of the defendant. The defendant, for the purpose of protecting its property, caused the drains in those parts of its cellar which could be connected with the public sewer in Freeman avenue to be plugged up so that the water backing up through the sewer could not force its way into the cellars of the defendant and cause damage to the beer and other material stored therein. It was noticed, however, that the water was seeping through the wall on the north side of the driveway cellar, which immediately adjoined plaintiff's property and this was seen coming through at a point about three and a half feet above the level of the cellar floor, which, of course, was some distance below the level of the floor of plaintiff's cellar. An attempt was made to stop this by putting oakum and other substances in between the masonry of the wall where the water was coming in, but the water kept coming in, and being carried to the well or tank above described, it was soon found that the syphon ordinarily in use could not carry it away fast enough and another syphon was ultimately installed and finally a pump was installed, so

that the water might be carried away from the tank as fast as it came in. It was also noticed that the water as it came through carried with it small portions of sand and that this sand, being carried over to the point where the drain pipe which led to the sub-cellar was, soon clogged the pipe so that it became necessary to break it in order to let the water through.

On the morning of March 31, 1913, about two o'clock, the property of the plaintiff began to sink, and sometime thereafter the side of the building nearest the property of the defendant collapsed. Shortly after the time that the building of plaintiff started to settle, someone who had been sleeping in the building went to the engineer of the brewery and told him to cease pumping as it was causing the building of the plaintiff to sink. However, the pumping was continued until the next morning, when it was stopped.

The next morning it appeared that the cement floor which was laid in the driveway cellar had been forced up and there was a large hole therein through which water and sand were coming and, being carried off to the tank, was being pumped out to the street.

It is upon these facts that the plaintiff sought to recover damages from the defendant company because of the alleged negligence of the defendant company in permitting the water to come through the wall and in pumping the said water out of its cellar.

The only evidence offered as to the cause of the collapse was the evidence offered by an expert engineer, Professor Marks, wherein he stated that the collapse was due to the fact that the water accumulating in the cellar of the plaintiff caused a hydrostatic pressure downward and sidewise, and that the water not being permitted to accumulate in the cellar of the defendant there was no hydrostatic pressure either downward or sidewise to counterbalance the pressure from the other side, and that by reason of this the soil under plaintiff's property, not being able to resist the pressure, was forced downward and sidewise and upward through the cellar floor of the defendant, and the support or foundation of plaintiff's building being removed the foundation fell in and collapsed. The evidence

shows that the wall which had been constructed by the defendant on the north side of its driveway cellar is still standing in the same condition and there is no evidence to show that the wall was not sufficient to support both the ground and the building of the plaintiff under ordinary conditions.

The evidence being substantially as indicated above, at the close of plaintiff's case a motion to direct the jury to return a verdict for the defendant was granted, and the plaintiff now claims that the court erred in granting said motion.

In support of his contention, counsel for plaintiff cites a number of cases, all of which, under varying facts, support the doctrine laid down in *Fletcher v. Rylands*, 1 L. R. Exch., 265, wherein the principle was enunciated that one who for his own purposes brings upon his land and collects and keeps there anything likely to do mischief if it escapes, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

It will be seen at a first glance that there is a wide distinction between one collecting on his land something that is likely to do mischief if it escapes, and one who attempts to relieve himself of certain damage by removing that which is likely to cause the damage and will cause it, even though it may be that in doing so he incidentally causes damage to his neighbor.

Granting for the moment the proposition that the evidence supports the allegations of plaintiff's petition, of which the court is not altogether sure, because the allegation of plaintiff's petition is such as would lead one to believe that the pumps sucked the sand from under the plaintiff's building, whereas in truth the evidence does not show that the pumps were anywhere near the plaintiff's building, it does not seem that the doctrine that one must use his own so as not to injure another has any application to the present case. It is not at all clear how the water accumulated in the cellar of the plaintiff, but it undoubtedly came there by reason of the fact that it was caused by the constantly rising river backing up through the drain pipes of plaintiff's premises from the sewer in the street, or that it seeped in from adjacent cellars on the north.

Under ordinary conditions, if plaintiff permitted a volume of water to accumulate in his cellar and did not take care of it, but permitted it to seep through the wall and to cause damage to the defendant, then plaintiff would have been liable herself, under the doctrine of *Fletcher v. Rylands*, for any damage that she caused to the defendant, unless she was able to show that the water was caused to accumulate in her cellar by the act of God.

Of course, in this case it must be conceded that the flood in the Ohio river, in 1913, was an act of God, and that therefore even though she had permitted the water to accumulate in her cellar, she could not be held liable if it escaped and damaged the property of the defendant. At least we can assume in that case it would so be held.

But it would seem more than passing strange that defendant should be held liable under the same circumstances, because it took such means as it thought was necessary in order to relieve itself of the water that was coming in upon it and which would have caused it great damage. It must be remembered in this connection that there is no proof that the operation of the pumps themselves exercised any injurious influences upon the soil underlying the property of the plaintiff, but her own expert, and he is the only witness who offers an explanation of what caused the damage to plaintiff's property, said it was the failure of the defendant to permit the water to rise in its cellar and thus equalize the hydrostatic pressure which was exerted downward and sidewise from the property of the plaintiff.

An examination of the American cases, which counsel for plaintiff cites in support of his theory that if any damage resulted to plaintiff's property by the removal of the water from defendant's cellar, defendant would be liable therefor, will clearly show that in all of these cases the defendants, either by the maintaining of nuisances or the erecting of works which changed the natural condition of things, caused damage to the plaintiff's property; and there is no case where, under circumstances such as we have here the defendant was held liable be-

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cause of attempts on his part to protect himself and his property from damage caused by extraordinary events.

In *Cahill v. Eastman*, 18 Minn., 324, and *Klapheide v. Eastman*, 20 Minn., 478, two cases that arose out of the same state of facts, the digging of a tunnel by the defendants caused the water of the Mississippi river to rush through and to damage the property of the plaintiffs, and the court held that by the manner of the building of the tunnel a nuisance was created and that the principle laid down in *Fletcher v. Rylands* applied.

In *Gerrish v. Clough*, 48 N. H.; 1, a breakwater was built by a riparian owner in such a manner as to wash away the land of his opposite neighbor and to flood that of his neighbor above, and it was held that while he had a perfect right to build a breakwater to protect his own land, that the building of it in such a way as to cause damage to his neighbors, which they would not otherwise have suffered except for its building, was the creating of a nuisance for which he was liable.

In *Valley Railroad Company v. Franz*, 43 Ohio St., 623, the railway company diverted a stream and by doing so caused damage to the land of the plaintiff by putting in action a force of water against his property, which would not have existed except for the diversion of the stream. There was not much contest about the liability in this case, the decision turning largely upon the plea of the statute of limitations as a bar to the action.

In *Coal & Iron Company v. Tucker*, 48 Ohio St., 41, the placing of slag from a mine on the bank of a stream where it was likely to wash, and did wash, causing a damage by reason of an overflow to the lands of a riparian owner below, was held to have created a liability. This was so because of the fact that the placing of the slag in such a position created a nuisance, and the court was evidently influenced to a considerable extent by the fact that there was a statute which provided that private persons who did acts of this kind could be punished criminally.

The case of *Defiance Water Company v. Ollinger*, 54 Ohio St., 536, which was a case where a stand pipe full of water was

permitted to become out of repair and shaky, with the result that it collapsed, causing personal injuries to the plaintiff, was held to be directly within the rule laid down in *Fletcher v. Rylands*.

The case of *Cork v. Blossom*, 162 Mass., 330, and the case of *Railway v. Bom*, 76 S. W., 350, are cases where states of facts similar to those found in the cases above cited were held to have created a liability.

But, it will be seen that all of these cases turn upon the question of maintaining a nuisance, or upon a direct trespass, and in none of these cases is it held that because a man protects himself against something that is a common enemy to him and all his neighbors he is liable for a damage that might in any way be incidental to his act of protection.

I am inclined to think that the doctrine laid down in *Rex v. Commissioners*, 8 Barn. & Cres., 355, is the doctrine that should be applied to this case, and it was largely upon that doctrine that the motion for a directed verdict was granted.

In that case the commissioners of sewers for the levels of Pagham had caused to be taken down certain groynes and other works which had been before erected to protect the levels against the inroads of the sea, and had erected certain other works in their place. The effect of this work was to cause the sea to flow with increased force against the land of one Cosens, and in consequence thereof his land had been gradually washed away, which reduced his property considerably in value. He claimed that the commissioners should compensate him as for land taken and that they should summon a jury to ascertain the expense. Lord Tenterden in deciding the case, after admitting that the effect of the work of the commissioners was to cause the damage complained of, said:

“But the sea is a common enemy to all proprietors on that part of the coast, and I can not see that the commissioners, acting for the common interest of several land owners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not en-

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deavor to protect himself by erecting groyne or other reasonable defense, although it may render it necessary for the owner of adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from doing so. * * * I am, therefore, of the opinion that the only safe rule to lay down is this, that each land owner for himself, * * * may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

Now, there is no doubt but that the flood of the Ohio river, in March, 1913, was the common enemy of all persons who were or might become subject to the invasion of its waters. Each owner had the right to make such efforts to prevent damage by the flood as the necessity of the occasion required, subject, however, to the principle that he must regard the rights of his neighbors in doing the work and not by his negligence cause them damage; but I can not conceive how the rule that requires one in the doing of work upon his own premises to regard the rights of his neighbors can be carried so far as to compel him to allow a large body of water to remain on his premises which might result in severe damage, in order to counter-balance the hydrostatic pressure that is exerted upon his neighbor's subsoil, where that neighbor has taken no means to prevent the water coming in upon her premises.

This same principle has been laid down, under similar facts, in *Lamb v. Reclamation Dist.*, 73 Cal., 135; *Hoard v. Des Moines*, 62 Iowa, 326; *Turnpike Company v. Green*, 99 Ind., 205; *Railroad v. Stevens*, 73 Ind., 278; *Bass v. State*, 34 La. Ann., 494; *Dubose v. Commissioners*, 11 La. Ann., 165.

In *Lamb v. Reclamation Dist.*, *supra*, the court, at page 131, referring to the principle laid down in *Rex v. Commissioners*, *supra*, say:

"Logically this principle would seem to be applicable to the waters of large navigable American rivers subject to extensive overflows, and it has been thus made applicable in a number of adjudicated cases."

Counsel for plaintiff seems to think that he has some right of action because of the provision of Section 3782, General Code, that if the owner of land excavates to a greater depth than nine feet below the curb of streets and causes any damage to any building upon the lots adjoining, such owner shall be liable to the party injured to the full amount of such damage.

I can not see now, and never have been able to see, the application of this statute to the facts of the present case. There is no evidence here to show that the excavation of the driveway cellar was the cause of damage complained of herein. As a matter of fact, the evidence shows that the wall which was erected next adjoining plaintiff's property is still standing and has been standing for a great number of years and is amply sufficient to furnish lateral support to the property of plaintiff. It was not the manner in which the excavation was made upon the defendant's premises, nor the depth of its cellar, that caused the damage, but it was the failure to permit the water to rise in the cellar so that the hydrostatic pressure might be equalized that was the direct cause of whatever damage plaintiff sustained, and in view of the authorities, it does not seem that this would create a liability for which damages might be had.

Therefore, I am of the opinion that there was no error in directing a verdict for the defendant, and the motion for a new trial will be overruled.

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COMPETENCY OF TESTIMONY BY AN INSANE WITNESS.

Common Pleas Court of Hamilton County.

STATE OF OHIO V. JAMES BROWN.

Decided, February 15, 1918.

Evidence—Assault on Inmate of an Insane Asylum Witnessed by a Fellow Inmate—Competency of His Testimony a Question for the Court—Its Weight and Credibility a Matter for the Jury.

In the prosecution of an attendant in an insane asylum for homicide in assault with a fatal result on one of the patients under his care, the testimony of a fellow inmate who witnessed the assault is competent, if the court, after examination of the said patient and other persons who are acquainted with his condition, is satisfied that he has sufficient understanding to apprehend the obligation of an oath and is capable of giving an intelligent and correct account of what took place; but the question of the credibility of such a witness and the weight to be given to his testimony is for the jury to determine.

Raymond Ratliff, for the motion.

Chas. Elston, Assistant Prosecuting Attorney, contra.

NIPPERT, J.

Opinion overruling motion for a new trial.

On January 31, 1918, the jury in the above case returned a verdict of manslaughter against the defendant, James Brown, finding him guilty of unlawfully killing Sabin Hollister, on the night of November 8, 1917, the said Sabin Hollister at the time of his death being an inmate of Longview Hospital for the Insane, located at Carthage, Hamilton county, Ohio.

Defendant's attorney, in filing a motion for a new trial, laid particular stress upon the fact that the court committed error in permitting two of the state's witnesses to testify, claiming that the said witnesses were, at the time of the occurrence concerning which they were to give their testimony, inmates at Longview Hospital for the Insane, having been committed to that institu-

tion as insane after proper inquest was had into their sanity at the Probate Court of Hamilton County, as provided by law.

The facts in the case may be summarized about as follows:

Sabin Hollister, the decedent, and Ralph I. Marshall, one of the witnesses whose testimony was objected to, were committed to Longview by the Probate Court of Hamilton County, Ohio, on the morning of November 8, 1917. Upon their arrival at the institution they were both confined in what is known as the "bum room" of cottage male ward No. 1. The term "bum room" is applied to the receiving ward for male inmates of the institution, where they are placed under "observation" for a period of about thirty days before they are distributed to the other wards of the institution according to the nature of their particular ailment. This "bum room" contained on the day of the murder about thirty patients, of whom five slept in beds, while about twenty-five slept on strawticks on the floor, according to the testimony of Walter Bennett, the senior day attendant. The testimony further showed that on November 8th, about 5:30 p. m., the inmates of this particular ward went to the so-called "bum room dining hall" and immediately after supper were ordered to bed. This was about 6:15 or 6:30 in the evening. The testimony is uncontradicted that Sabin Hollister, at the time of his commitment, was in good physical condition, showed no bruises of any kind upon his body; that he was a man weighing about one hundred and seventy pounds, and about five feet eight inches tall; that prior to his commitment he was a patient at the psychiatric ward of the City Hospital, where, according to the testimony of Dr. Raman, he was considered a jovial, harmless sort of a character and gave no trouble whatsoever to the attendants. About 7:30 p. m., the day attendant in the "bum room" at Longview is relieved by the night attendant, in this case A. E. Barlow, whose duty it is to look after the wants of the patients during the night and see that no harm or injury befalls any of them. The witness, Marshall, occupied the straw-tick nearest to the door where Barlow's chair and table were located; next to Marshall's straw-tick was that of Sabin Hollister, the decedent. Opposite Hollister's straw-tick was the wash-room. Some time during the

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early part of the evening Hollister went into the wash-room to use a cuspidor in a manner not permitted by the rules of the institution. Barlow, the night attendant, called to his assistance the defendant, James Brown, who had charge of another ward on the same floor, about one hundred feet north of the "bum room." A scuffle ensued in the wash-room between Barlow and Brown (the attendants), and Hollister, the inmate. Hollister was roughly handled by both men and dragged back to his place on the floor; a short time after, suffering great pain from the assault committed upon him, he became restless. Thereupon, Barlow again called upon his colleague, Brown, for assistance, and both men, according to the testimony of Marshall, assaulted Hollister by kicking and beating him about the chest, ribs, abdomen, kidneys and spinal column, from the result of which Hollister died about midnight, and his lifeless body was dragged by the two attendants into a so-called "strong room," from whence it was later removed to the wash-room of the hospital ward and prepared for the undertaker by an inmate, Harry Grear. The report turned into the superintendent's office by the two attendants showed that Hollister died of "convulsions." The only eyewitness to the various assaults upon Hollister was Ralph I. Marshall, who occupied the mattress next to him in the "bum room," and the only eyewitness to the fact that Barlow called Brown to assist him in subduing Hollister was Sam Glancy, who occupied a cot in the north ward in charge of Brown.

It was mainly on the testimony of Marshall and Glancy, corroborated by the coroner's inquest upon the body of Hollister, that the jury found James Brown guilty of manslaughter.

The *post mortem* performed upon the remains of Hollister by Coroner Dr. Bauer and Dr. Howard showed thirty-one separate and distinct fractures of the ribs on both sides of the body, two distinct fractures of the sternum, lungs pierced by two of the fractured ribs, while the left kidney was completely ruptured, causing an extensive abdominal hemorrhage.

The defendant, Brown, was jointly indicted with A. E. Barlow,* for murder in the first degree, by the grand jury of Hamil-

*Barlow plead guilty to manslaughter and has since been sentenced.

ton county, on November 16, 1917. Brown testified that previous to his employment at Longview he had served three years in the Philippines and upon his return worked in a West Virginia coal mine, and just prior to his employment as an attendant in the "observation ward" of Longview was, to use his own words, a "roustabout." He had never seen a lunatic until he went to Longview. He denied the charges contained in the indictment and claimed that he only struck or pushed Hollister *once*, in the beginning of the affray, and that he did that in *self-defense* when Hollister attempted to strike him, and that he did not put either his hands or his feet on Hollister at any time after that, and if any great injury was done to Hollister, resulting in his death, it must have been done by Barlow during defendant's absence.

Brown's claim of self-defense is directly contradicted by the testimony of Ralph Marshall, an inmate of the "observation ward" at the time when the crime was committed, and who was the chief witness for the state. To the admission of Marshall's testimony defendant's counsel has raised serious objection, and claims prejudicial error by reason of the court permitting his testimony to go to the jury.

Section 11493 of the General Code of Ohio provides as follows:

"All persons are competent witnesses *except those of unsound mind*, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly."

Strange as it may seem, there is no published report to be found in Ohio interpreting that part of our statute referring to persons of unsound mind, although there are numerous decisions in almost every state of the Union and in the federal courts on what is meant by persons of unsound mind and their competency as witnesses.

The common law anciently rejected the testimony of the insane as incompetent, but Sir Edward Coke, in the early part of the seventeenth century, in his Commentaries upon Littleton, Vol. 2, Lib. 3, Chap. 6, Sec. 247a, qualifies the ancient common

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law doctrine and divides those of unsound mind into four distinct groups, as follows:

"*Non compos mentis* is of four sorts:

"1. Ideota, which from his nativitie, by a perpetuall infirmitie, is *non compos mentis*.

"2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding.

"3. A lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis*, so long as he hath not understanding.

"Lastly, hee that by his owne vitious act for a time depriveth himselfe of his memorie and understanding, as he that is drunken."

Thus, a lunatic is called *non compos mentis* only "so long as he hath not understanding," and is *not* a lunatic whenever he enjoys lucid intervals. However, those who were unfortunate enough to be mentally unbalanced were evidently not given the benefit of their lucid moments and had no legal status during those centuries when insane asylums were unknown, and later, when these asylums did exist, they were merely prisons for the insane, no attempt being made to cure or heal the inmates of their physical and mental ailments.

That this medieval condition of affairs does still exist in many of our states and counties, is a fact that seems almost beyond belief. (See January, 1917, issue of "Mental Hygiene," Dr. Thomas W. Salmon, "The Insane in a County Poor Farm.")

It can not be maintained truthfully that this lack of care is due to the poverty of the respective states or communities. Therefore, it must be due either to the lack of interest on part of the state in its unfortunate ones, or gross neglect of duty on part of those charged with the grave responsibility of the care of these public charges.

It is only in more recent years that some of our states have given the inmates of insane asylums the benefit of the services of trained psychologists and mental experts and have given the patients the advantage of *trained nurses*, laboratories, therapeutics, operating rooms, etc. In other words, these states have

made their hospitals for the insane hospitals in fact, and not in name only. Whether or not such is generally the case in Ohio, this court is not advised, but submits this question to the brethren of the medical profession for determination.

It was not until the year 1851 that the Court of Criminal Appeal of England laid down a more reasonable and humane interpretation of the ancient common law in the now leading case of *Regina v. Hill*, reported in Cox's Criminal Law Cases, Vol. V, page 259, which gives a sound and practical value to the qualifications indicated by Coke two hundred and fifty years prior.

In the *Hill* case an attendant was convicted of manslaughter of an inmate of an insane asylum, and the star witness for the state was, at the time of the commitment of the crime, an inmate of the ward in which the murder was committed, and it was on his testimony that the attendant was convicted. The testimony of the insane witness was attacked by the defense on the general proposition that the testimony of a lunatic was inadmissible. Donelly, the witness, was, both at the time of the occurrence upon which he gave his testimony and at the time of the trial, *non compos mentis*, in the legal, medical and ordinary sense of the term. He was declared by one of the medical witnesses to be, in the strict sense of the term, a lunatic, laboring under an insane delusion from which he was never free, and exhibited the characteristic symptoms of insanity which are said to be "a confirmed belief in an assumed idea upon which the patient is always acting, without any apparent bodily disease, to the truth of which he would pertinaciously adhere in opposition to the plainest evidence of its falsity." Lord Campbell, in his opinion in the *Hill* case, asks this very pertinent question, to-wit:

"In what sense is the expression *non compos mentis* employed?"

He then proceeds:

"If a person be so to such an extent as not to understand the nature of an oath, he is not admissible. But a person subject to a considerable amount of insane delusion may yet be under the sanction of an oath and capable of giving very material evi-

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dence upon the subject-matter under consideration. * * * The proper test must always be, does the lunatic understand what he is saying, and does he understand the obligation of an oath? The lunatic may be examined himself, that his state of mind may be discovered, and witnesses may be adduced to show in what state of sanity or insanity he actually is; still, if he can stand the test proposed, the jury must determine all the rest. *In a lunatic asylum, the patients are often the only witnesses to outrages upon themselves and others, and there would be impunity for offenses committed in such places if the only persons who can give information were not to be heard.*"

Judge Coleridge, concurring in Lord Campbell's opinion, states that—

"There was a disease upon the mind of the witness, operating upon particular subjects, of which the transaction of which he came to speak was not one. He was perfectly sane upon all other things than the particular subject of his delusion. As far as memory was concerned, he was in the position of ordinary persons, and upon religious matters he was remarkably well instructed, so as to understand perfectly the nature and obligation of an oath."

And Judge Talfourd, in a concurring opinion, stated:

"If the proposition, that a person suffering under an insane delusion can not be a witness, were maintained to the fullest extent, every man subject to the most innocent unreal fancy would be excluded. Martin Luther believed that he had had a personal conflict with the devil; Dr. Johnson was persuaded that he had heard his mother speak to him after death. In every case the judge must determine, according to the circumstances and extent of the delusion. Unless judgment and discrimination be applied to each particular case, there may be the most disastrous consequences."

The testimony of the insane inmate, Donelly, was admitted; the conviction of the brutal attendant was sustained; and the case of *Regina v. Hill* has been made the basis of all similar questions which have arisen since 1851, both in England and in the United States.

A similar question was decided in the United States in 1859, in the case of *Holcomb v. Holcomb et al*, 28 Conn., 177. There the court held:

"The question of competency is for the court and must be settled before the witness is sworn. The state of a person's mind in this respect may be ascertained by an examination of the witnesses acquainted with him, or by a personal examination of him by the court, or by counsel in the presence and under the direction of the court, or by all of these modes at the discretion of the court. When the court is satisfied that the person (offered as a witness) has capacity sufficient to comprehend the nature and obligation of an oath, he may be sworn as a witness. In the case under consideration, the witness was admitted to testify without objection, no question having been made as to his sanity at the time he was sworn. But the defendants insist that he was insane at the time the facts occurred about which he testified, and that it was competent for them to have shown it at the time to detract from the force of his testimony. The plaintiff claims that insanity is no objection to either the competency or the credibility of a witness, provided he is sane at the time he is sworn; and he relies upon the case of *Evans v. Heltick*, 7 Wheaton, 453, to sustain his position."

Justice Story in that case overruled the objection of the defense "because a person being subject to fits of derangement is no objection either to his competency or credibility, if he is sane at the time of giving his testimony." But the question of whether the witness was insane at the time of the transaction about which he gave his testimony was not raised in the *Evans* case. The learned court in the *Holcomb* case held that—

"Fits of derangement will not impair the credit of a witness otherwise unaffected, and still the question, as to what is the effect of insanity at the very instant of the transaction, upon the story of the narrator will remain unanswered. * * * The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them honestly, and if the mind of the witness is in such a condition that it can not accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory his story will make but a feeble impression upon the hearer though it be told with the greatest apparent sincerity.

"We are therefore of opinion that the insanity of a witness at the time of the transaction about which he is called to testify, does impair the force of his testimony, and is a matter proper to be considered by the triers to whom his testimony is submitted.

* * * In the case of *Grant v. Thompson*, 4 Conn., 208, this

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court held that it was proper 'to go into a history of the supposed lunatic's mind, before, at, and after his contract in order to ascertain his real condition at the moment of entering into the agreement.' "

Because the trial court in the Holcomb case did not permit the defendant to introduce such evidence, the case was reversed and a new trial was granted. But the court in its ruling follows the case of *Regina v. Hill*, of the Court of Queen's Bench, decided in 1851.

That this question seems never to have been squarely raised in Ohio is evidently partly due to the popular belief which assumes that a person can not be a competent witness while an inmate of an insane asylum, or testify to facts which occurred during his confinement in such an asylum.

In the case of Marshall, whose competency is attacked, it may be stated that he was released from the guardianship of Longview and declared to be sane about four weeks *after* the occurrence of the crime to which he claims to have been a witness and he was under no medical or legal restraint at the time he offered his testimony.

Glancy, the other witness objected to, was at the time of the occurrence of the crime and at the time of the trial still confined at Longview.

When Glancy and Marshall were offered as witnesses for the state, counsel for defendant moved that the jury be excused and that an inquest be had in open court into their competency. The burden of proof in the case of Marshall (who had been released) rested upon the defendant to show that Marshall was incompetent to testify; while in the case of Glancy (who was still confined at Longview), the burden was upon the state to show that Glancy was competent.

The alertness of mind, as demonstrated by Glancy during his cross-examination, showed beyond doubt not only that he knew the sacredness and obligation of an oath and realized the pains and penalty of perjury, but that he was fully capable, as far as his memory was concerned, to give a coherent and logical account of the occurrences concerning which he was called upon to give his testimony. No medical experts were called in the

case of Glaney. But it was different in the case of Marshall. Three well-known alienists and psychiatrists of the city were called upon to give their opinion concerning Marshall's condition of mind.

Dr. Herman H. Hoppe, of the University of Cincinnati, and director of the department of mental and nervous diseases at the City Hospital, testified that in the case of Ralph I. Marshall he, in consultation with the staff of the psychopathic ward of the City Hospital, made a *provisional* diagnosis in Marshall's case of a paranoiac form of dementia precox, which, Dr. Hoppe explained, means—"a person who undergoes a premature dementing process, and who, while undergoing this dementing process, has ideas of a persecutory character based upon hallucinations and delusions, and that such a person is of unsound mind." This examination of Marshall was made at the City Hospital about three or four days prior to November 8, 1917, when he was committed to Longview. In reply to a question put to the doctor by defendant's counsel as to whether or not a paranoiac could relate matters of injury or persecution to another without exercising some exaggeration, Dr. Hoppe answered:

"Yes, sir; they could. * * * I should distinguish between a paranoiac and a parnoiac of the type of dementia precox. The ordinary paranoiac is usually a man of more than average intelligence, and of an acute judgment; and if the fact under consideration does not pertain to his sphere of persecution, he can be a reliable witness to those facts. There are paranoiacs who are working along and going through all the functions of life; but a paranoiac dementia precox is a man who has the paranoiac symptoms coupled with mental weakness; and for that reason what he says may be hampered by the weakness of his judgment, of his inability to put restraint on what he says, or what he sees; so that while a paranoiac may be a good witness in the individual case, in a paranoiac dementia precox type we would have to distinguish, so far as that individual was concerned, how much the mental deterioration had taken place in that individual. * * * I believe that *they could tell what they saw if what they saw was not in relation to their own persecutory ideas*; but a man with dementia precox might give a different version of what he saw because it would be necessarily biased by a weakness of intellect, weakness of judgment, and weakness of perception; because nearly every dementia

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precox case is living on a lower level of intelligence, and therefore he is not as trustworthy a witness as the other. * * * I want to say that that was a provisional diagnosis at that time; that he had this appearance, but there was some doubt in my mind; and the reason of there being a doubt in my mind was that he didn't have the ordinary history of a typical paranoiac case; to the best of my belief he is a dementia precox case; that is the way I would look at it; that is the way I would like to put it without making it an absolute, positive statement. * * * I should think, and I believe that an ordinary paranoiac could testify to facts outside of his sphere of persecutory ideas, because they can and do take care of all kinds of businesses. * * * I have got one of them now who is a pretty good teacher in the public schools. * * * We never accept the statement of fact of an individual who is mentally unbalanced unless we can corroborate it by some one else or by circumstances."

Dr. David I. Wolfstein stated that Ralph Marshall was a paranoiac with a mild degree of dementia precox and that such a person was able to give a fairly good account of an occurrence not connected in any way with any of the delusions which are the basis of his mental disorder, and that an individual of that kind has a great many perfectly lucid moments about things not definitely connected with his own particular delusions, although he may be given to exaggeration. When questioned as to whether or not a man of Marshall's type who is given to exaggeration could give a correct account of what he saw, the doctor answered as follows:

"Yes, he can relate correctly what he sees, certainly."

When Dr. Wolfstein was asked by defendant's counsel to give his opinion as to the trustworthiness of the witness, the court sustained the objection of the prosecutor since the trustworthiness or the credibility of a witness is a question entirely within the province of the jury, *and the only question at issue at the sanity inquest was the competency of the witness, the determination of which was strictly within the province of the court.*

It appeared further from the testimony that Marshall was employed as a clerk during the past few years in two large mercantile houses of our city, and had not been a very popular em-

ployee with the other workmen in the place and that they had shown their dislike for him in various ways. One of the witnesses testified that Marshall was not a mixer; that his health was poor; that he did not associate with the other employees who did not like him and stayed away from him. He also stated that they never cared much for him and had little to do with him. He was corroborated in this by the employees themselves. Marshall testified that he felt keenly this hostility of his colleagues and it worried him considerably, so that finally he suffered a nervous breakdown and went to the City Hospital for treatment. The testimony showed that no *medical* examination of Marshall was made, but that his *mental* state alone was inquired into at the City Hospital. It developed, however, that after Marshall was released from Longview Hospital for the Insane he had an operation performed on his nose and cheekbone, which has relieved his nervous condition considerably, and which according to the statement of the operating surgeon, was the cause of much of his nervousness.

Marshall was able to satisfy the court of his full appreciation of the sacredness of an oath and of the pains and penalty of perjury. He withstood the test of one of the severest cross-examinations on part of defendant's counsel ever witnessed by the court. The history of his life, all of the incidents within a month prior to his commitment to Longview, to test his memory, recollection, clearness of perception and ability to relate logically and coherently matters which occurred prior to, at the time of, and immediately after the murder of Hollister, were gone into during this most minute cross-examination. The witness was able to draw a sketch of the ground-plan of the building showing the wards in which he was confined, and the details of the rooms and halls connected with the "bum room." In fact, he showed his competency as a witness at every point where the same was attacked by defendant's counsel.

The burden of proof of establishing Marshall's incompetency as a witness resting upon the defense, and the defense having failed on this point, there was no alternative for the court but to admit Marshall as a witness and leave the question of the

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trustworthiness or the credibility of his testimony to the jury under proper instructions.

While it is true that our Ohio Supreme Court has no occasion to interpret that part of Section 11493 of the Ohio Code excepting "persons of unsound mind" from those who are competent as witnesses, we have a decision of the Circuit Court of the United States, Judges Taft, Lurton and Sage presiding, which sustains, not only the court's ruling in permitting Marshall to testify, but is particularly in point on the question of permitting Samuel Glancy, then an inmate of Longview, to testify. This is the case of *Pittsburgh & W. Ry. Co. v. Thompson*, reported in 82 Fed., 720. Judge Lurton, delivering the opinion of the court, interprets Section 11493 of the Ohio Code as follows:

"That a person has been found insane, and is an inmate of an insane asylum, affords *prima facie* evidence that he is of unsound mind, within the meaning of the provision, and operates to throw the burden of proving competency upon the party offering him. * * * Whether he was so unsound in mind and memory as to be totally incapable of testifying is as open a question under this statute as at the common law. The statute is but a declaration of the common law. To suppose that it was meant to disqualify every person who is of any degree of unsoundness would bring about an intolerable condition of things, and, under such circumstances, it is not to be presumed that the common law was intended to be altered or modified to any greater extent than indicated by a reasonable construction of the words of the statute. To say that a person of unsound mind is incapable of testifying is but to state the general rule of the common law. But at the common law the unsoundness must be such as that he is incapable of understanding the nature of an oath or giving a coherent statement touching the matter upon which he is examined."

Under the Minnesota statute pertaining to the competency of witnesses, Section 9 provides as follows:

"The following persons are not competent to testify in any action or proceeding:

"First, those who are of unsound mind, or intoxicated, at the time of their production for examination."

The Supreme Court of Minnesota, in the case of *Cannady v. Lynch*, 27 Minn., 436, says:

"It would be contrary to the general tenor and spirit of the statute to construe the first subdivision of Section 9 as intending to exclude, on account of mental unsoundness or intoxication, those who, at common law, would be competent. The terms 'of unsound mind' and 'intoxicated' are very indefinite. It is a matter of common observation that persons may be mentally unsound on some subjects, and as to others as sound as people generally; or may be in some degree unsound, or to some extent intoxicated, and yet be capable of recollecting past events accurately, and possess the ability and appreciate the duty to relate them truly, as fully as persons who are sober, and in all respects of sound mind. It is not to be supposed that the statute intends to disqualify such persons. It is more reasonable to suppose it intends to exclude persons as witnesses only when unsound or intoxicated to a degree that would exclude them at common law; that it intends to affirm the common law rule on the subject, and admit persons as witnesses when, at the time they are offered to be sworn, they are possessed of 'such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong sufficient to appreciate the sanctity and binding force and obligation of an oath.

"If a person offered as a witness must be tested by this rule, it is evident the test must be applied by the trial court at the time of offering him. His condition at that time must determine his competency."

The Supreme Court of the United States, in the case of *District of Columbia v. Armes*, reported in 107 U. S., 519, Justice Field delivering the opinion of the court, following the decision of the Court of Criminal Appeal in the case of *Reg. v. Hill*, *supra*, held that—

"A person affected with insanity is admissible as a witness, if it appears to the court, upon examining him and competent witnesses, that he has sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue."

The symptoms which the various alienists presented to the court as indicating dementia precox of the paranoiac type, such

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as lack of memory, inability to relate coherently and logically the same occurrences at different times, were peculiarly absent in the case of Marshall during the trial, as well as in the case of Glancy, and they both related with surprising intelligence and astonishing clearness of expression the matters at issue concerning which they gave their testimony. This being the case, the court permitted the witnesses to be sworn and give their testimony to the jury, to all of which counsel for defendant excepted.

At the conclusion of all the testimony and the argument of counsel, the court charged the jury very fully and explicitly on the question of the credibility of witnesses, and the jury returned a verdict finding the defendant guilty of manslaughter, which, under all the circumstances of this case, as well as under the law as viewed by the court, should not be set aside.

The motion for a new trial is overruled. An entry may be submitted accordingly.

**NOTICE AS TO LOCATION OF LAND OFFERED AT
JUDICIAL SALE.**

Common Pleas Court of Hamilton County.

WILLIAM A. HOPKINS, TREASURER, v. MARY C. OLIPHANT ET AL.

Decided, 1917.

Judicial Sales—Sufficiency of Description in Advertisement of the Location of the Parcel Which is to be Offered.

The purpose of the requirement of Section 11678, with reference to the description of property which is to be offered at judicial sale, is accomplished in the case of a vacant lot where it is described as located on a named street 110 feet south of a named intersecting street.

*Louis H. Capelle, Assistant County Prosecutor, for motion.
A. B. Dunlap, contra.*

GEOGHEGAN, J.

The same questions are raised in this case as were raised in the case of *William A. Hopkins, Treasurer, v. Hamer Bradbury et al*, 19 N.P.(N.S.), 286.

The advertisement, in so far as is necessary to a determination of this case, is as follows:

“Situate in the city of Cincinnati, Hamilton county, Ohio, to-wit: Lots 34, 35, 39 and 41 on a plat of subdivision made by D. W. Strickland as master commissioner in case No. 40713, Court of Common Pleas, Hamilton County, Ohio, of part of Lots 2 and 3 of the Clifton farm, as per plat thereof recorded in Plat Book 4, page 63, Records of Hamilton county, Ohio; said Lot 34 being 25 feet in front on the easterly side of Spring Grove avenue and extending back easterly between parallel lines 110.69 feet on the south line and 115.54 feet on the north line and lying 55.02 feet north of Brashears street.”

J. B. Meifeld purchased this lot at a sheriff's sale under proceedings to foreclose the tax lien and now refuses to take the lot because of alleged non-compliance with the provisions of Section 11678 of the General Code in so far as the advertisement does not describe the intersecting or crossing streets north and south of the property in question. The matter is now heard on a motion for a rule to compel him to show cause why he should not be adjudged in contempt of court, and the motion will be granted for the same reasons as were expressed in the Bradbury case, *supra*.

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**CONTRACT AS TO RATES OF FARE RENDERED UNENFORCEABLE
BY THE PUBLIC UTILITIES ACT.**

Common Pleas Court of Hamilton County.

**THE KING POWDER COMPANY V. CHARLES S. THRASHER AND
CHARLES M. LESLIE, RECEIVERS, ETC.**

Decided, January Term, 1918.

Interurban Railway Rates—Right-of-Way Granted in Consideration of Special Rates—Different Schedule Subsequently Fixed by the Public Utilities Act—Agreement as to the Rates Originally Fixed no Longer Enforceable—Private Agreements Which May be Abrogated by Subsequent Legislation—Without Violating Constitutional Guaranties—Courts of Appeals Decisions Not Binding Outside of the District in Which Rendered.

1. A decision by a court of appeals is not binding on common pleas judges in districts other than the one in which it was rendered.
2. The act creating the Ohio public utilities commission is valid and enforceable in so far as it vests in the commission control over railway rates.
3. The power of the public utilities commission is not restricted by contracts affecting private interests, and an agreement whereby a right-of-way was granted by a corporation to an interurban railway company in consideration of the employees of the corporation being carried for certain fixed rates of fare is not enforceable against the railway or its receivers, notwithstanding the contract antedates the passage of the public utilities act.

*Tuttle & Ross, for plaintiff.**Dinsmore & Shohl, contra.*

CUSHING, J.

Plaintiff seeks to enjoin defendants from making effective a schedule of passenger fares filed with the Public Utilities Commission of Ohio as provided by Section 505, General Code.

Plaintiff contends that its officers, employees and the employees of the Peters Cartridge Company, by virtue of a contract, are entitled to ride on defendant's cars for fares less than that fixed by the schedule for the public; that the contract was entered into June 3, 1902, by and between the plaintiff and the Rapid Railway Company, predecessor in title to the Interurban Rail-

way & Terminal Company of which the defendants are receivers, and that so far as the fares to be charged said employees are concerned, the contract supersedes the act of the Legislature creating the Public Utilities Commission, and any act that the state by its Legislature in the future may enact into law. A copy of the contract is as follows:

"THIS AGREEMENT entered into at Cincinnati, Ohio, this 3d day of June, A. D. 1902;

"WITNESSETH: That a contract has this day been made by and between the Rapid Railway Company, party of the first part, and the King Powder Company, party of the second part, upon the following terms and conditions:

"For and in consideration of one (\$1.00) dollar to each of said parties by the other paid, the receipt whereof is hereby acknowledged and mutual covenants and obligations hereby assumed, it is agreed that the said the King Powder Company will permit the said railway company to construct upon a right of way forty (40) and sixty (60) feet wide and upon the line shown on the plat hereto attached and made part hereof, a railway, to be operated by electricity or other improved motive power, except steam, through the property of the said powder company, with the necessary switches, y's, turnouts, poles, wires and other equipment; and upon the completion of the said construction over the route aforesaid by the 31st day of December, 1902, the said the King Powder Company will, without further consideration, execute and deliver to the said the Rapid Railway Company its conveyance by deed of the title to a right-of-way over the route aforesaid.

"The said the Rapid Railway Company covenants and agrees that it will promptly prosecute the construction of its railway as aforesaid over the said route, and will complete the same by the said the 31st day of December, 1902; and in constructing same, that it will erect and maintain all proper and necessary fences, cattle-guards, crossings and drains for the mutual benefit and protection of its right-of-way, and of the remaining property of the said King Powder Company and that in operating said railway it will sell to the employees and officers connected with the said the King Powder Company and the Peters Cartridge Company—

"Monthly tickets, good for fifty rides each in the hands of the purchaser only, between King's Mills and Lebanon for the sum of \$3.00.

"A similar ticket good for transportation between King's Mills and Mason for the sum of \$2.50.

"It is further agreed and covenanted that if, at any time after the completion of said road, the said Rapid Railway, its

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successors or assigns, shall cease to operate said line of road over and upon the right-of-way as herein granted for a period of ninety (90) days, the said right-of-way herein contracted to be granted through the property of said the King Powder Company shall, at the option of the said King Powder Company, revert and revest in the said party of the second part.

"It is further contracted and agreed that if the said party of the first part shall construct a line of railway connecting the line herein contracted to be built with the town of Morrow in the county of Warren, then the said party of the first part shall sell to the officers and employees connected with the said the King Powder Company and the Peters Cartridge Company monthly tickets good for fifty (50) rides each in the hands of the purchaser only between King's Mills and the town of Morrow for a sum not to exceed three (\$3.00) dollars.

"It is further agreed and covenanted that the time for the completion of this construction, to-wit, December 31st, 1902, shall be subject to extension by the mutual consent of the parties hereto, and shall receive such further additional time as may be necessary to compensate for delays caused by litigation or unavoidable casualty not within the control of either of the parties to this contract.

"IN TESTIMONY WHEREOF, the said the Rapid Railway Company by vote of its directors has caused its name and corporate seal to be attached hereto, and the name of its President and General Manager to be hereunto signed. And the King Powder Company has caused its name and corporate seal to be hereunto attached and the name of its President to be hereunto signed, at Cincinnati, the day and date first aforesaid.

(SEAL.)

"THE RAPID RAILWAY COMPANY,

"G. R. SCRUGHAM,

*"President and General Manager.**"Attest: J. M. KENNEDY.*

"THE KING POWDER COMPANY,

"G. A. PETERS, Pt.,

*"Attest: J. H. McKIBBEN, Secy."**"President."*

This contract was dated June 3, 1902. The act of the Legislature creating and defining the Public Utilities Commission, was enacted into law by the state in April, 1906, entitled—

"AN ACT

"To regulate railroads and other common carriers in this state, create a board of railroad commissioners, prevent the imposition of unreasonable rates, prevent unjust discrimination, and to insure an adequate railroad service."

The sections of the act to be considered are:

"Sec. 505. Each railroad shall print in plain type and file with the commission, within a time fixed by the commission, schedules which shall be open to public inspection, showing all rates, fares and charges for transportation of passengers and property, and any service in connection therewith, which such railroad has established and which are in force at such time between all points in this state upon its line, or any line controlled or operated by it."

"Sec. 508. No change thereafter shall be made in any schedule, including schedule of joint rates, or in any classification, except upon ten days' notice to the commission. All such changes shall be plainly indicated upon existing schedules, or by filing new schedules ten days prior to the time they are to take effect, but the commission, upon application of any railroad, may prescribe a less time within which a reduction may be made. Copies of all new schedules shall be filed as provided in the preceding section in every depot, station and office of such railroad ten days prior to the time they are to take effect, unless the commission shall prescribe a less time."

"Sec. 510. No railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as being then in force. The rates, fares and charges named therein shall be the lawful rates, fares and charges until they are changed as provided in this chapter."

"Sec. 513. Nothing in this chapter shall prevent concentration, commodity, transit and other special contract rates, but all such rates shall be subject to the provisions of this chapter as to their printing and filing, shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be under the supervision and regulation of the commission."

"Sec. 527. Upon an investigation, if the rate or rates, or any regulation, practice or service complained of is found to be unreasonable or unjustly discriminatory, or the service inadequate, the commission may fix and order substituted therefor, such rate or rates, fares, charges or classification as it shall have determined to be just and reasonable, which shall be charged, imposed and followed in the future. It also may make such orders respecting such regulation, practice or service as it shall have determined to be reasonable, which shall be observed and followed in the future, but no rates fixed shall exceed the maximum rates prescribed by any statute of this state in force at the time the commission fixes such rates."

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Section 527 provides for an investigation of rates by the commission on its own motion.

In October, 1917, defendants filed with the Public Utilities Commission, Tariff No. 30, fixing fares between Lebanon and King's Mills at fifteen cents, and Mason and King's Mills at ten cents per ride. On this state of facts the questions presented are:

1st. It being admitted that the contract in question was entered into for the consideration stated, does the act of the state of Ohio passed in April, 1906, impair the obligation of contract contrary to the provision of the Constitution of the United States, that "no state shall pass any law impairing the obligations of contract"?

2d. If under the police power, the state had the inherent, continuing power to fix and regulate rates of transportation, was the contract void when entered into, or did it become non-enforceable after the state had legislated on the subject-matter of the contract?

Before discussing the questions with reference to the fundamental law, I shall briefly review the contentions of the parties.

Plaintiff claims:

(a) That there is no discrimination in the fares fixed by the contract, as there is nothing in the contract to prevent the public from having the same rate of fare as said employees. Taking the contention as made, it means that the railroad and the Public Utilities Commission must fix the rate at the contract price; that the contract controls the act of the Legislature, and that the Public Utilities Commission has no power to supervise or regulate said rates of fare. To this contention the answer must be made that the power of the state, acting through the Public Utilities Commission can not be controlled by private contracts between individuals or corporations. The question of legislative power will be considered when I come to pass on the main question in the case.

(b) The defendants by this contract are not estopped to deny the validity of the contract, or that it was *ultra vires*. The rule is, that a receiver is not bound by a contract, made by a company before his appointment, which does not constitute a lien on the property. The receivers can not be compelled to per-

form it. This question has reached the text-book stage of the law. *High on Receivers*, Sec. 393c.

"An action may be maintained against the receivers, by leave of court, to recover damages sustained by plaintiff by the construction of a railway through his premises without making compensation therefor prior to the receiver's appointment. * * * So where a railway company has contracted with a marble company to carry marble from its quarries to a given plant, allowing it to be stopped at an intermediate station to be prepared for the market, and a considerable quantity of marble upon which the freight has been prepaid under the contract is at such intermediate point at the date of the appointment of a receiver over the railway company, an action can not be maintained against the receiver for specific performance." *High on Receivers*, Sec. 398a.

(c) Where the validity of a contract is denied or ignored, the only remedy for its violation is a proceeding for specific performance or injunction. The answer to this contention is found in subdivision "b" *supra*.

(d) The plaintiff has an adequate remedy at law if it seeks compensation for property appropriated to public use. If the parties by contract have agreed on the valuation of the land for a right-of-way, and the contract is breached by a party to it, in a proper action a court will assess damages for the breach of the contract. Such a case should be submitted to a jury; under proper instructions all elements of the contract should be considered in determining the measure of damages.

(e) A decree in equity will not be refused, nor the contract held to be unconscionable because of reasons, arising after it was entered into, it became more burdensome than was anticipated. This is a correct statement of the law in a proper case, but the principle can not be held to extend to or confer on individuals or corporations legislative powers, nor can the power of the state be abridged by such contract.

(f) Does a decision of the Court of Appeals of Lucas County bind the Court of Common Pleas of Hamilton County the same as a decision of the Supreme Court of the state or the Court of Appeals of Hamilton County?

I can not agree with counsel as to the construction to be given to the constitutional amendment or the theory of government

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as determined by the people in adopting this amendment to the Constitution, September 3, 1912. The provision referred to is:

Art. IV. Sec. 1. "The judicial power of the state is vested in a Supreme Court, courts of appeals, courts of common pleas, courts of probate and such other courts inferior to the courts of appeals as may from time to time be established by law."

The constitutional provision in force prior to 1912 was adopted by the people in 1883:

"The judicial power of the state is vested in a Supreme Court, circuit courts, courts of common pleas, courts of probate, justices of the peace and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Both these provisions are limitations on the power of the General Assembly. Since 1912 the Legislature is prohibited from creating courts other than those inferior to the courts of appeals. Under the 1883 amendment a court might have been created superior or equal to the circuit court.

As I understand the letter and spirit of the amendment, it was, so far as controversies between litigants are concerned, there should be one trial and one review. As to such matter, the courts of appeals were constituted courts of last resort. The state reserved the power, when a question is presented to a local court that involves the inherent power of the state, the rights of the people either on a constitutional question or the inherent or implied powers of the state, that it should be finally determined by the Supreme Court. That is the tribunal removed from local environment, and was created for the purpose of representing the people of the state, and to safeguard the power and interest of the state itself.

It can not be that the determination of a question by the Court of Appeals of Lucas County was intended to bind the Court of Common Pleas of Hamilton County so that it would not be at liberty to express itself fully on any question.

A determination of a question by the Supreme Court, or Court of Appeals of Hamilton County binds this court. This is as it should be. Section 6 of Article IV of the Constitution is:

“The courts of appeals shall have original jurisdiction * * * to review, affirm, modify, or reverse the judgments of courts of common pleas * * * and judgments of courts of appeals shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction and cases of public or great general interest.”

This provision vests courts of appeals with the power stated over judgments of common pleas courts in its district, not elsewhere.

A clear distinction is also made between cases of public interest, and cases of great general interest. This is a case of public interest. The power of the state is challenged.

This view is strengthened by the following:

Section 6, Article IV, of the Constitution:

“And whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.”

The Supreme Court has passed on the question. In discussing the question of jurisdiction of courts of appeals it held that the only difference between the circuit court and court of appeals is in name. They say:

“A mere change of name of a court does not change the court, when the clear manifest constitutional purpose is to the contrary.” *Mahoning Valley Ry. Co. v. Sautore*, 93 O. S., 53.

It has held in a number of cases, that the decision of a circuit court of one district was not binding on a common pleas court in another district.

On the questions presented by counsel for defendants:

(a) That the contract is harsh, inequitable, unfair, against public interest and contrary to the public policy of the state as expressed in the Public Utilities Act, it seems that in so far as the questions involve the fixing of rates of fare, this court is without jurisdiction to pass on any of these questions. The state has vested the rate regulation and making power in the

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Public Utilities Commission. It has vested in it certain discretion. This court can not fix a rate, review one established, nor has it the jurisdiction to express an opinion as to the reasonableness or unreasonableness of any rate fixed according to law. The Public Utilities Commission has that power and discretion. The only review provided by the state from the act of the Public Utilities Commission is to the Supreme Court of the state.

But if I am in error in the view here expressed, and this court has jurisdiction to pass on a contract as to whether it is harsh, inequitable, unfair and against public policy, I call attention to the following cases:

“The city of Marshall agreed to give the Texas & Pacific Railway three hundred thousand dollars in county bonds, and sixty-six acres of land within the city limits for shops and depots; and the company ‘in consideration of the donation’ agreed ‘to permanently establish its eastern terminus and Texas offices in the city of Marshall,’ and ‘to establish and construct at said city the main machine shops and car works of said railway company.’ The city performed its agreement, and the company, on its part, made Marshall its eastern terminus, and built depots and shops and established its principal offices there. After the expiration of a few years Marshall ceased to be the eastern terminus of the road, and some of the shops were removed. The city filed this bill in equity to enforce the agreement, both as to the terminus and as to the shops. *Held*: (1) That the contract on the part of the railway company was satisfied and performed when the company had established and kept its depot and offices at Marshall, and had set in operation car works and machine shops there, and had kept them going for eight years and until the interest of the railway company and of the public demanded the removal of some or all of these subjects of the contract to other places; (2) And the word ‘permanent’ in the contract shall be construed with reference to the subject matter of the contract, and that under the circumstances of the case it was complied with by the establishment of the terminus and offices and shops contracted for, with no intention at the time of removing or abandoning them; (3) That if the contract were to be interpreted as one to forever maintain the eastern terminus and the shops and Texas offices at Marshall, with regard to the convenience of the public it would become a contract that could not be enforced in equity. (4) The remedy of the city for the breach of contract, if there was a breach, was at law.” *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S., 393.

Mr. Justice Miller delivering the opinion of the court further says:

"And we are further of the opinion, that if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity."

The subject of contract between a common carrier and an individual for a right-of-way over land was considered by the Supreme Court of the United States:

"A railroad company on receiving from the plaintiff a conveyance of and for its road agreed for itself and its assigns not to build a depot within three miles of the one which it built on the land conveyed. Subsequently it sold its road to defendant which proposed to build a station within three miles, in pursuance, as was admitted, of an order of the state railroad commission.

"*Held*: That the injunction should not issue.

"*Query*: Whether the burden of the contract passed to defendants.

"Whether a railroad station should be built in a certain place is a question involving public interest.

"If it appears to the court that it would be against public policy to issue an injunction against a railroad corporation the court may properly refuse to be made an instrument for such a result whatever the pleadings in the case may be."

Mr. Justice Holmes in delivering the opinion uses this language:

"To compel the specific performance of a contract still is the exception, not the rule, and courts should be slow to compel it in cases where it appears that permanent interest will or even may be interfered with by their action. It has been intimated by this court that a covenant much like the present should not be enforced in equity, and that the railroad should be left at liberty to follow the course which its best interests and those of the public demand." *Beasley v. Texas & Pacific Ry. Co.*, 191 U. S., 492.

(b) That the contract was in its inception invalid as being *ultra vires*, and provided unfair, unreasonable discrimination as against the public in favor of the few persons specified in the contract. It seems to me that question was settled by the

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case of the *Union Pacific Ry. Co. v. The C. R. I. Ry. Co.*, which will be referred to later.

(c) On the question of an adequate remedy at law my views are fully stated above, and need not be here repeated.

The nominal consideration of the contract was one dollar. The consideration moving from the King Powder Company was the permission to the railway company to construct and operate its road over property owned by the powder company. The consideration moving from the railroad company was the construction and operation of the road and the rates of fare provided in the contract.

The property was subsequently deeded to the railroad company as is shown by the record. The railroad was constructed and operated, and is now being operated by the receiver. The rates of fare provided in the contract were given to the employees for about fifteen years.

Both parties to the contract dedicated the property to a public use. The Supreme Court of the United States has stated the law with reference to powers of government over property dedicated to a public use:

“Under the powers inherent in every sovereignty a government may regulate the conduct of its citizens towards each other, and when necessary for the public good the manner in which each shall use his own property.” *Munn v. Illinois*, 94 U. S., 113.

From the first colonization of this country the colonies and the states have regulated common carriers, ferriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc.

The subject under consideration is a common carrier. The inherent power of the state to regulate common carriers implies that property devoted to such a use is subject to control and regulation by the state. The public has an interest in all such property, and one portion can not be “cut out” and receive consideration different from all the property of such corporation. It follows that at the time the land was contracted for and deeded to a corporation, dedicated to a public use, the grantee must have contemplated the laws of the state and its

inherent power and will be deemed to have submitted it to control and regulation by the state.

There can be no difference between property deeded to a company for public use and that appropriated under the power of eminent domain. The law provides that property can not be appropriated until after a failure to agree. It is the use to which the property is put that gives the state jurisdiction.

Plaintiff goes back of the deed and relies on the contract in pursuance of which the deed was executed and delivered. Both the contract and the deed must have been executed in contemplation of the law of the state, and the inherent power of the state over the grantee, the railroad company. The fact that the contract was valid when made can not affect the question. The question is one of power. The power of the state can not be abridged, controlled or superseded by private contract. The state had the power, and when it exercised it all rights and property were subject thereto.

This principle was well stated by the Supreme Court of Oregon:

“Whenever an owner devotes his property to the use in which the public has an interest, he must submit to be regulated and controlled by the public for the common good.” *Woodburn v. Public Utilities Commission*, 82 Ore., 114.

Counsel for plaintiff contends that the law of Ohio is different from that stated, and relies on the case of *Taylor et al v. Niles, Receiver*, 21 C.C.(N.S.), 391; 2 Ohio App., 293. As already pointed out, this court does not feel bound by the decision in that case. The question goes to the power of the state. It is one of public interest. The tribunal vested with the power to finally determine the question of public interest is the Supreme Court, and its determination alone is binding on the lower court. If the decision in the case of *Taylor v. Niles* is correct, it ultimately will be determined that way. I am of the opinion that that case does not correctly state the law. It may be that the considerations here expressed were not called to the court's attention in that case.

Plaintiff further relies on the case of *The Interurban Railway & Terminal Company v. City of Cincinnati*, 93 O. S., 108.

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In that case Judge Johnson of the Supreme Court of Ohio, in the opinion of the court makes it clear that the village of Pleasant Ridge in granting the franchise that became a contract, acted under and within the statutes passed by the state giving the municipality power to make such contracts. Whether the power of the state is such that it may by a repeal of the statute or the enactment of a law that supersedes such act set aside contracts made by its agents and subordinates is a question that need not be passed on at this time. The question in the Pleasant Ridge case was different from that in the case at bar. Judge Johnson calls attention to the following sections of the statutes, General Code, Sections 9100, 9104, 9113, 9117 to 9122, and adds:

“The acceptance of the grant by the company constituted a binding contract between the parties, and as long as the company retains the privileges and operates the railroad thereunder its terms are binding.”

On page 121 Judge Johnson uses this language:

“In the absence of statutory provision to the contrary, the village was empowered to stipulate, as one of the ‘terms and conditions’ which it was authorized to fix by the provisions of Section 3443, Revised Statutes, for a certain rate of fare for a road from any point in its limits to a point outside of its limits.”

The question in this case is, does the contract undertake to, or does it fix rates of fare that the state can not alter, regulate or control? It is contended that it is with reference to a certain class of individuals.

In passing on a contract between railroad companies, Chief Justice Fuller of the Supreme Court of the United States quotes with approval the following:

“Neither the form of expression on the one hand, nor the name on the other is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed.” *U. P. Ry. Co. v. C., M. & St. P. Ry. Co.*, 163 U. S., 582.

No act of the state through its Legislature or otherwise has been called to the court's attention giving the parties to this

contract the power to enter into it. In the absence of such authority the parties to the contract in question could not be said to have entered into it without a knowledge of the laws of the state, or the inherent power of the state over common carriers.

The first act of the state exercising control over common carriers was passed February 11, 1848. The same power was exercised in 1852, 1872, 1873 and on numerous dates since. The acts specifically mentioned above were considered and sustained by the Supreme Court of Ohio in *Smith v. P., Ft. W. & C. Ry. Co.*, 23 O. S., 10.

Coming to the question as to whether or not the Public Utilities Act of 1906 contravenes the guaranty of the Constitution of the United States that no state shall pass any law impairing the obligation of contract, the tribunal vested with power to finally determine the question of the constitutionality of an enactment of the state Legislature is the Supreme Court of the United States. That court has passed on a number of cases involving contracts entered into between railroad companies and other parties.

The Northern Pacific Company entered into a contract with the city of Duluth. The consideration for the contract was a cash payment by the railway company of \$50,000. The city was to construct and keep in repair the viaduct and its approaches over Lake avenue, for a period of fifteen years. Within that time the viaduct and its approaches became out of repair, the city called on the railway company to repair the same. It refused. Suit was filed by the city. The railroad company answered setting up its contract and made the same claim as presented in this case.

In *Northern Pacific Ry. Co. v. State of Minnesota, ex rel City of Duluth*, 208 U. S., 583, Mr. Justice Day says:

“The fallacy involved in the claim of the relator, and as we think, in some decisions, by which its claim is supported, arises from a failure to distinguish between rights of property, which confessedly are protected under the Constitution from being divested or appropriated for other purposes without compensation, and the very different matter concerning the manner in which the owner may use his property so as not to unnecessarily endanger the public.”

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After citing a number of cases, Mr. Justice Day continues:

"The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.

"In this case the Supreme Court of Minnesota has held that the charter of the company, as well as the common law, requires the railroad company as to existing and future streets, to maintain them in safety, and to hold its charter rights subject to the exercise of the legislative power in its behalf, and that any contract which undertook to limit the exercise of this right was without consideration, against public policy and void. This doctrine is entirely consistent with the principles decided in the cases referred to in this court. But it is alleged that at the time this contract was made with the railroad company, it was at least doubtful as to what the rights of the parties were, and that the contract was a legitimate compromise between the parties, which ought to be carried out. But the exercise of police power can not be limited by contract, for reasons of public policy. Nor can it be destroyed by compromise, and it is immaterial upon what consideration the contracts rest, as it is beyond the authority of the state or the municipality to abridge this power, so necessary to public safety."

Other authorities supporting this doctrine are: *Ry. Co. v. Woodenware Co.*, 158 Wis., 130; *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash., 330; *Seaman v. Ry. Co.*, 127 Minn., 180; *Woodburn v. Public Service Commission*, 82 Ore., 114; *Portland Ry. Co. v. Oregon Ry. Commission*, 229 U. S., 397, 412; *State, ex rel Wubster, v. Superior Court*, 97 Wash., 37; *Home Telephone Co. v. Los Angeles*, 211 U. S., 271; *Manigault v. Springs*, 199 U. S., 473, 480; *Buffalo East Side R. R. Co. v. Buffalo St. Ry. Co.*, 111 N. Y., 130; *Ry. Co. v. Nebraska*, 170 U. S., 67.

The other question to be considered is, if under the police power, the state has the inherent, continuing power to fix and regulate rates of transportation, was the contract void when entered into, or did it become non-enforceable after the state had legislated on the subject-matter of the contract?

It seems to me that under the decision of Justice Fuller, the subject-matter of the contract in this controversy is rates of fare.

Plaintiff contends that the rates of transportation fixed by Schedule 30 of the record is the act of the defendant. The power to regulate and control rates of transportation on common carriers is vested in the state. The state by its duly constituted legislative authority has created the Public Utilities Commission with power to review, determine and, if it is found that the rate fixed by the railway company is unjust, oppressive or discriminatory, that it may itself fix a rate. If either the public or the railway company is not satisfied with the conclusion of the Public Utilities Commission, an appeal is provided to the Supreme Court of the state. Therefore, this court in passing on the contract can not pass upon the question of the reasonableness, or whether the contract discriminates between certain persons and certain employes, or whether the rate is just to the public and to the railway company. The only question for this court is, whether or not the contract does fix a rate of fare, and whether by fixing a rate of fare the contract can supersede the authority of the state to regulate or control a rate fixed by the Public Utilities Commission. Whether this is a special contract rate as provided in Section 513 of the General Code, is not a question for this court.

It is not necessary to cite authorities to establish the position that a contract can not supersede or overthrow the power vested in the Legislature.

It seems, from a review of the authorities:

1st. That the act of the state of Ohio creating the Public Utilities Commission, when considered in connection with the contract sued on in this case, does not contravene the Constitution of the United States.

2d. That the contract in question can not be enforced in equity against the receivers.

3d. And that if the receivers had not been appointed it could not be enforced against the company.

The plaintiff's petition will therefore be dismissed at its costs.

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Guardian S. & T. Co. v. Bryar.

**RESTRICTIONS UPON THE USE OF LOTS INTENDED FOR A
HIGH-CLASS RESIDENCE DISTRICT.**

Common Pleas Court of Cuyahoga County.

THE GUARDIAN SAVINGS & TRUST COMPANY V. WILLIAM BRYAR.

Decided, January Term, 1918.

Building Restrictions—Right of Lot Owners to Require Enforcement of—Not Lost by Foreclosure Proceedings, Where All Were Made Parties and a Consent Decree Entered—Possible Future Necessity for Use of Property for Business Purposes.

1. The foreclosure proceedings upon the land of the allotment company, which had imposed restrictions as to the use to be made of the lots, the court holds in no way constituted an abandonment or waiver of the restrictions, but rather fixed the status of lot owners whose purchases were made either before the entering of the decree, and the restrictions so originally embodied by the allotment company are enforceable by lot owners.
2. No ground for refusal to enforce such restrictions is found in the mere fact that, in the opinion of the judge who hears the case, the ground may be needed at some future time for business purposes.

Squire, Sanders & Dempsey, for plaintiff.

David Perris, contra.

FORAN, J.

It will not be necessary to make any extended statement as to the issues involved in this case. It is sufficient to say that the plaintiff, the Guardian Savings & Trust Company, the intervening petitioner, Amelia B. Baxter, and the defendant, William Bryar, are the owners of sub-lots in the Euclid Heights allotment, the Guardian Savings & Trust Company being the owner of sub-lots 694 and 695; the intervening petitioner is the owner of sub-lots 664, 697 and 698, and the defendant Bryar is the owner and is in possession of sub-lot 699. It will therefore be seen that all of these lots are practically contiguous, some of

them being on Lancashire road and some on Hampshire road. The Euclid Heights allotment as originally planned and laid out something over twenty years ago provided for a general plan of restrictions; and while perhaps the deeds in themselves to the various lots sold did not contain covenants that all sales of lots in this allotment should be made subject to like restrictions, as was done in the case of *Wallace et al v. The Clifton Land Company*, 92 O. S., 349, nor can it be said that each purchaser agreed and covenanted, as well for the use of every other person who might become the owner of a lot in this allotment as for the use of his grantor, that he would observe the restrictions, as was done in *McGuire v. Caskey*, 62 O. S., 419, yet all the lots were sold, so far as they were sold, in pursuance of a general plan or scheme for the improvement of the property and a consequent benefit to all purchasers. What is meant is, that while the deeds did not have inserted in each of them in express words the scope and purpose of this general plan, so as to bind each separate purchaser and his assigns, yet the plats and the allotment and the maps and the advertisements were of such a character that all purchasers understood that the lots were sold subject to certain restrictions for the benefit of all lot purchasers and according to a general scheme or plan for the improvement of the property and the resulting benefits of such improvement to all owners of property in this allotment as a residential district. The promoters of the Euclid Heights allotment had visions which might have been realized had there been sufficient capital to carry through the scheme of allotment as originally planned; but that such capital was lacking is made evident by the subsequent events. The tract of land was a large tract, containing several thousand lots, and to raise money for the purchase of land, as well as to improve it according to the general plan, a blanket mortgage was placed upon the whole tract, this mortgage being to secure payment of bonds issued thereunder. The mortgagee and the bondholders were not, of course, bound by the restrictions, and might sell the property, in case default was made in payments, free and clear of such restrictions. It was provided, of course, that as each lot was sold

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and paid for, the lot so sold was to be released from the operation of the mortgage. The allotment company becoming bankrupt, foreclosure proceedings were instituted and a decree of foreclosure obtained in common pleas court of this county. Every person to whom a lot had been sold was made a party defendant in the foreclosure proceeding, and the decree, to a certain extent, may be said to be a consent decree. The mortgagee and the bondholders discovered, of course, that they could not realize the amount of the indebtedness due to them, or the face of the mortgage, if the lots were to be sold subject to the original restrictions. In some instances the restrictions ran to August 31, 1953; in other instances the restrictions expired on November 23, 1916, and in some instances the restrictions expired November, 1917. Sufficient to say that the dates of the expiration of the restrictions varied in several portions of the allotment. The land was allotted in 1894. In the decree it was sought by the mortgagee or the bondholders and by the persons to whom lots had been sold, and which lots had been released from the operation of the mortgage, to make all the restrictions expire on January 1, 1934, and also to protect, as far as possible, the *bona fide* purchasers of lots sold by the Euclid Heights Realty Company; hence some of these lots were sold under the decree subject to restrictions which prohibited the use of liquor only upon the premises; others of the lots were sold with restrictions limiting the use of the land to residence purposes only; and again, others of the lots were sold limiting the use of the lots or land "for private residence purposes only." The defendant's lots contained this latter restriction, the restrictions being as follows:

1. Until January 1, 1931, said premises shall not be used for apartment or boarding house purposes, but shall be used for private residence purposes only, including necessary outbuilding, garages and barns.
2. During said period only one dwelling-house or residence shall occupy said premises.
3. During said period no dwelling-house or residence shall be erected or moved upon said premises, or any part thereof, which shall be of less value than \$6,000.

These restrictions are contained in the deeds of the lots owned by the plaintiff, the intervening petitioner and the defendant.

The defendant proposes and claims the right to erect upon one of his lots, or upon premises owned by him, a double-family house, one located above the other. Except in this respect, the proposed dwelling conforms strictly to the restrictions. There are no dwellings upon the lots owned by the plaintiff, the Guardian Savings & Trust Company. Upon the lot owned by the intervening petitioner, Amelia B. Baxter, there is a dwelling-house erected about twenty years ago and costing at that time about \$20,000. On lot 667 there is another dwelling erected perhaps some time later. Between the lot of the intervening petitioner and this latter dwelling there are two lots, and practically east of lot 667 there are three lots, which contain the restrictions already described. Lots 662 and 663, east of the Baxter residence, or the residence of the intervening petitioner, are also similarly restricted. Nine lots north of these two dwellings are also similarly restricted. It is one of these lots owned by the defendant upon which the proposed double house is sought to be erected. The defendant's lot and the other nine lots similarly restricted are located on Hampshire road. The lot of the intervening petitioner, Amelia B. Baxter, and the lot upon which a dwelling-house is already erected east of her, face on Lancashire road.

The answer of the defendant, in his second defense, avers that all the lots on Hampshire road, except eight thereof, have erected thereon apartment houses, two-family houses and double houses; and that the lots not so built upon can not be sold or disposed of for any other purpose except buildings of the same character, that is, for apartment houses, two-family houses or double houses; and that if the restrictions are so enforced as to prevent the erection of dwelling-houses or houses of this character, these lots are no longer beneficial or advantageous, and the defendant says that the restrictions should not be held to forbid the character or kind of dwelling he proposes to erect, for the reason that the character of the neighborhood has so changed that it would be inequitable to enforce these restrictions

as the plaintiff and intervening petitioner claim they should be enforced.

It was also claimed in argument that the defendant had no notice of any general plan or scheme of improvement in this allotment which was intended to enhance the value of the property by general compliance with the restriction by all lot owners, and therefore the restrictions can not be enforced as against him by an adjacent or adjoining lot owner or any lot owner, and in no event could be enforced except by the original grantor.

It was held in *Schubert v. Eastman Realty Company*, 1 O. C.C(N.S.), 585, that when the owner of land subdivides and sells it to lot purchasers with restrictions in the deeds as to the purpose for and manner in which the land may be used, one lot purchaser can not enforce such restrictions against another lot purchaser unless the restrictions are uniform for all the lots similarly situated and part of a general scheme for the improvement of the whole tract. This is undoubtedly good law.

In a recent case, *Kiley v. Hall*, not cited by counsel, decided by the Supreme Court May 15, 1917, and which may be found in 96 Ohio State, —, it was held in the syllabus:

"1. The purchaser of a lot in an allotment whose deed contains restrictions as to the use of the lot, is not chargeable from that fact alone with notice that like restrictions are contained in the deeds of the other purchasers of lots in the allotment.

"2. A lot owner can not maintain an action to enforce by injunction the observance of restrictions contained in the deed of another lot owner where it does not appear that the latter purchased his lot with notice of a general plan for the improvement of the lots of the allotment in accordance with the restrictions contained in his deed, or with notice that such restrictions were inserted in his deed for the benefit of the owners of the other lots of the allotment."

This is the very latest utterance of our Supreme Court upon this subject.

It is not denied and must be admitted that in the original allotment of the Euclid Heights Realty Company there was a

general plan and scheme of improvement of the property and its subsequent benefit to all lot owners, and this general scheme or plan was of such character as would enable one lot owner to enforce by injunction against any other lot owner the restrictive covenants written into each deed in pursuance of this general plan. The defendant purchased his lot at a judicial sale where the lots were auctioned off by the sheriff and sold to the highest bidder in pursuance of the decree and advertisement. The defendant received a sheriff's deed, and it has been universally held that the effect of a deed made by a sheriff or other proper officer to a purchaser of land at an execution sale, is to vest in the purchaser as good and as perfect a title or estate in the premises sold as was vested in the defendant at or about the time the land became liable to the satisfaction of the judgment. This doctrine is so well established that citation of authorities is unnecessary.

In *Stiles v. Murphy*, 4 O., 97, it was held that—

“The deed of conveyance (from the sheriff) shall be as good and sufficient as the debtor could have made at any time after the said land became liable to the said judgment.”

And in *Sternberger v. Ragland*, 57 O. S., 148, it was held that—

“The deed of a sheriff conveyed a title as good and complete as a judgment debtor can convey.”

Or, in other words, the sheriff, acting under a decree of court, gives to the purchaser the same title that the judgment debtor could have given, and no greater title. The judgment debtor against whom the decree ran and operated was the Euclid Heights Realty Company, and it must be held that the deed from the sheriff to a defendant in this case has practically the same effect as a deed made to him by the Euclid Heights Realty Company; and, therefore, under the law, any lot owner has a right, under the circumstances, to enforce by injunction the restrictive covenants contained in the deeds. It will not avail the defend-

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ant to say that he did not have such notice as the Supreme Court says is necessary in the case of *Kiley v. Hall*, *supra*, and for the reason that it has become a doctrine of *stare decisis* in Ohio that the rule of *caveat emptor* is applicable in all its force to purchasers at judicial sale. *Pittsburg Ore Co. v. Linde*, 55 O. S., 23; *Arnold v. Donaldson*, 46 O. S., 73. This doctrine may be said to be elementary.

Under the doctrine of *caveat emptor*, the defendant was bound to examine and judge for himself as to the title of the land he purchased from the sheriff, unless he was dissuaded from so doing by representations of some kind; and in the absence of fraud or an express warranty, the defendant has no relief against a defect in the title or any restrictions appertaining to these lots, nor has he any relief for any unsuitableness of the land for any particular purpose, and which an examination, which he was free to make, would have revealed. If he had examined the decree or made such an examination as he was bound to make, he would have known and discovered that the lot he was purchasing owed a servitude to every other lot in this allotment, and this servitude is in the nature of an easement, or what might be termed a negative easement, the exercise of which by the other lot owners might be injurious to him, as, under the circumstances, they have a right to forbid the building of a double house, which he is now proposing to construct and erect.

It was held in the case of *Vattier v. Little*, 6 O., 483, that "The sale by sheriff excludes all warranty. The purchaser takes all risks. He buys on his own knowledge and judgment. If this was not the law, an execution, which is the end of the law, would only be the commencement of a new controversy."

In the case of *Ellenberger v. Sheppard*, decided June 5th, 1916, by the Cuyahoga County Court of Appeals, and which involved a question of restrictions precisely similar to this in the case at bar—one of the Euclid Heights Realty Company lots—it was held that:

"A general plan for uniform restrictions was adopted by all the several lot owners, and became incorporated as a part of

the decree in foreclosure proceedings, by which plaintiff availed himself of the right to bring this action."

With this the court of appeals said it was not much concerned, "inasmuch as we think the decree bound each lot owner who consented to its terms, and thereby became operative in behalf of the plaintiff, and thereby gave him capacity to bring this suit."

In this case it was held that the word "private," as used in the deeds to defendant, the plaintiff and the intervening petitioner, meant that only a single residence could be erected upon any of these lots; and this is undoubtedly the doctrine of *Hunt v. Held*, 90 O. S., where the court, in the opinion at page 283, says:

"If it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as 'a single residence,' 'a private residence,' and 'a single dwelling-house.'"

The same doctrine is held in *Arnoff v. Williamson*, 94 O. S., 145, where the court say, in referring to the case of *Hunt v. Held*, 90 O. S., *supra*, at page 151:

"We took the position there that the word residence was used in contradistinction to business, and it was held that such a provision did not prevent the erection of a double or two-family residence on the premises."

And then the court, on page 152, approves and readopts the language used in *Hunt v. Held*, already quoted.

There can be no doubt, we think, as to the correctness of this holding. The language of the restrictions is that "Said premises shall not be used for apartment or boarding-house purposes, but shall be used for private residence purposes only." It will be here seen that apartments and boarding-houses are expressly excluded, and that the property was intended to be used for private residences only. Private really means personal or concerning an individual or peculiar to an individual; that is, it relates to the privacy of an individual. Under her deed the interven-

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ing petitioner, Amelia B. Baxter, had a private right of property, that is, a right in her individual or personal capacity, that is, a right purely personal to herself. She had a right of retirement or seclusion that would be invaded by a two-family residence or an apartment house on the adjacent or adjoining lot.

It is true that courts undoubtedly are inclined to hold that where there is any doubt as to the meaning, force and scope of restrictions, that doubt should be resolved in favor of the free use of the land. Restrictions of this character are perhaps in derogation of common law right, and are to be strictly construed; still we must not lose sight of the fact that acquired rights of individuals should not be freely disregarded. In this age of super-organized activity, in the mad rush for money, place and power, there ought to be some place for the man who believes that the thunderous rush and roar of commerce is not all of life, and that a man who rolls on golden wheels along the sordid road of existence, "an incarnation of fat dividends," is rather to be pitied than envied. There are some men who still prefer to dream in quiet places and invite the genius of solitude rather than dwell in splendor amid the cacophonous tumult of industrialism and the nerve-racking atmosphere of cyclopean competition. When we find a man of this type who has purchased the right to immunity to live and enjoy life far from the maddening, roaring crowd and the smoke, dirt, ear-splitting noise and brawling saloon frequenters, we feel that he has some rights that should be protected. There are still some men left on the oasis of peace in the scorching desert of commercialism, whitened with the bleached bones of men prematurely dead from frazzled, deckle-edged nerves, who believe that apartment houses, terraces and flats are monstrosities productive of more social and other evils than ever escaped from Pandora's box; who have learned from experience that the closer we cling to the bosom of mother nature the happier we are, and that without happiness and the power to appreciate the joy of natural living life is a hideous nightmare. There are many men still living who believe that apartment houses and terraces are places of abomination where little children are execrated and forbidden and where

pedigreed poodle dogs are mothered and coddled. These men love the fields, the forests, the trees, and they like to live under the open sky where nature "holds communion with her visible forms." These men believe that "silence is the element in which great things fashion themselves together," and that "silence and solitude heal the blows of sound." And it is well for the community and for the nation at large that there are still living a good many persons who fondly cherish the dream, at home, that silence and solitude are the great educators that teach men how to live and how to die.

It is claimed by counsel for the defendant, whose argument was not only adroit but at times really persuasive, that there has been a change of conditions in this allotment which renders it inequitable to now enforce these restrictions. It was said in *Burton v. Cooper*, 8 N. P., 406, that—

"Where land is laid out for sale as building lots and put upon the market as subject to conditions or restrictions that are held out to purchasers as applying to the whole tract so as to create a general plan of subdivision, any person taking the land with either actual notice, as by covenants embodying the conditions or restrictions appearing in the chain of title of the lots, or constructive notice, as by the plan itself, will be bound by the conditions, and a court of equity will aid any purchaser in preventing any of the other purchasers or owners from defeating the plan.

"Such a plan is not abandoned until the parties have waived the rights accruing to them from the covenants or general plan, or until the plan is so far abandoned that the original purpose is defeated thereby."

The testimony clearly shows that there has been no such change of conditions since defendant purchased his lot as falls within the dictum just quoted. The decree fixed the status of all lot owners who had purchased prior to the decree or those who purchased under the decree, and the testimony does not show that there has been any abandonment or any waiver from the Euclid Heights Realty Company or the purchasers under the judicial sale.

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In *Evans v. Foss*, 194 Mass., 513, it was held, in the last paragraph of the syllabus, that—

“If, since the restriction was imposed, there has been no material change in the conditions directly affecting the character and use of the property in question, a court, in a suit in equity, will enforce the restrictions.”

And the court further said that the mere fact, in the opinion of the judge that hears the case, that the land may at some future time be wanted for business purposes furnishes no reason for refusing to enforce the restriction.

For the reasons indicated, the prayer of the petitioner and intervening petitioner will be granted, and the defendant will be perpetually enjoined from erecting the character of house described in the plaintiff's petition.

**USE OF MEMORIAL HALL FOR A PICTURE SHOW ON
SUNDAY NIGHT FORBIDDEN.**

Common Pleas Court of Clark County.

STATE OF OHIO ET AL V. FRANK H. MILLS ET AL.

Decided, February 2, 1918.

County Commissioners—Have Authority to Lease a Memorial Hall for Public Entertainments—But in so Doing They May Not Provide for Violation of a Penal Statute.

1. There is vested in county commissioners clear statutory power to permit the auditorium of a memorial building to be occupied for any private purpose which does not interfere with the public use of the building, and this power includes the right to lease such a hall to persons desiring to give entertainments therein.
2. But the power so vested does not confer upon the commissioners the right to lease such a hall for a purpose forbidden by statute,

or to persons who publicly announce their purpose to use it in violation of a penal statute, such as the giving therein of a moving picture show on Sunday evening, and injunction lies against such use.

Summers & Beard and Sully Jaymes, for plaintiffs.

T. F. McCormick, Justin Altschul and John M. Cole, contra.

GEIGER, J.

A petition is filed by Richard E. Pettiford and others, in the name of the State of Ohio vs the County Commissioners, the Trustees of Champion Aerie 397, Fraternal Order of Eagles, and the Epoch Producing Company, in which the court is asked to restrain defendants, as commissioners of Clark county, from permitting the other defendants to use the Memorial Building for the purpose of exhibiting a certain moving picture film known as "The Birth of a Nation."

The action is brought by the tax-payers under favor of Section 2922, General Code, the prosecuting attorney having refused to bring the same.

It is alleged that the commissioners have leased the Memorial Building to the other defendants for the period of eight days, commencing on Sunday, the 3d day of February, for the purpose of exhibiting said picture, and unless said restraining order is allowed certain of the defendants will give such entertainment on Sunday, February 3d, and on Sunday, February 10th, and for six week days commencing on February 4th.

The character of the picture known as "The Birth of a Nation" is not put in question by the pleadings. It has been licensed by the State Board of Censors of Ohio and it is conceded this order can not be questioned in any way, except by application to the board of censors to review its own action, or by commencing an action in the Supreme Court of Ohio, to have the order of the board of censors set aside, vacated or amended. *Epoch Producing Co. v. Davis*, 19 N.P.(N.S.), 465.

Those seeking the injunction maintain that the statutes providing for the erection of a memorial building (3059-3069,

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G. C.) fix the purpose for which the building after erection may be used, viz: "To commemorate the services of the soldiers, sailors, marines and pioneers of the county." They insist that under the statutes the county commissioners have no power to lease the building for any purpose which is not in itself a commemoration of those named in the statute. Many authorities are cited in support of this contention that public officials may not divert the use of a public building to any other purpose than that for which the same was erected, and it is insisted that the display of a moving picture can in no way tend to carry out such purpose.

County commissioners can exercise no power nor do any act. unless the same is expressly authorized and done in the manner provided by the statute, and we must therefore look to the statutes governing county commissioners in their control of a memorial building, to determine the extent of their power.

The building was erected by a board of trustees composed of five citizens, to commemorate the services of the soldiers, sailors, marines and pioneers of this county. There is no limitation in the act as to the character of the building to be erected by such trustees, the only limitation being the cost thereof, which shall not exceed \$250,000.

The trustees in the exercise of their authority caused to be constructed a building having a large auditorium capable of seating several thousand people, the use of which is sought to be restrained.

Upon the completion of a memorial building of a design and character which seemed most suitable to the trustees it was turned over to the commissioners, who were required by the statute to provide for its maintenance, equipment, decoration and furnishing, at a cost of not to exceed \$25,000.

It will thus be seen that the county commissioners had nothing to do with the character of the building erected or with its structural arrangement, but were obliged to receive from the trustees such building as had been constructed by them, and, having furnished the same, it is now their duty to maintain it.

The act provides that "they may permit the occupancy and use of the memorial building, or any part thereof, upon such terms as they deem proper."

Manifestly, the occupancy permitted by the statute is any occupancy to which the structure of the building is suitable. To hold that it may be occupied only for such purpose as would commemorate the services of various worthy persons, is to place a limitation upon the use of the building which was not controlling when the same was constructed.

Had it been the legislative intent that the building could be used only for certain memorial services there would have been some limitation upon the trustees who constructed it, but the Legislature having left the trustees free to select any style of building that to them seemed best, it would necessarily result in a great loss to confine its occupancy to purposes more restricted than those which governed its construction.

Memorial buildings constructed in the state of Ohio under favor of this act have as one of their principal features large auditoriums, and it has been the custom of the county commissioners to permit the use of these for various and widely different classes of entertainment, some of which have been public in their nature, and others under private management.

Aside from these considerations, there are many cases which hold that if a building is constructed for certain public purposes, the public authorities in control of such building may derive a revenue by renting portions thereof not required for public service, or may even permit the use of same without compensation. *Gottlieb-Knabe & Co. v. Macklin*, 31 L. R. A. (N.S.), 580; *Herald v. Board of Education*, 31 L. R. A. (N.S.), 588; *State v. Hart*, 33 L. R. A., 118; *McQuillan on Municipal Corporations*, Vol. 3, 2522.

The court is of the opinion that there is clear statutory power vested in the county commissioners to permit the occupancy of the auditorium of the Memorial Building for any lawful, private purpose, when the same does not interfere with the public use of such building, and to lease the same to those desiring to use it for the purpose of giving entertainments.

There remains, however, the further claim urged by the defendant, that even though the commissioners may have the right to lease the building for various forms of entertainment, they have no right to lease it for the purpose of exhibiting a moving picture on Sunday.

Section 13049, General Code, provides that whoever on Sunday participates in, or exhibits to the public, with or without charge, a theatrical or dramatic performance, shall be punished as therein provided.

In the case of *Myer v. State*, 25 C.C.(N.S.), 556, it is held that a moving picture show is a theatrical performance, and is prohibited on Sunday by Section 13049, General Code.

A motion to direct the court of appeals to certify its record in this case was overruled by the Supreme Court April 25th, 1916, which leaves this case as the declaration of the law of Ohio upon this point.

It is conceded by counsel for both sides that if any of the defendants should exhibit a moving picture on Sunday, that they would violate this penal section of the statute. It is also conceded that courts of equity will not enjoin the commission of a crime.

The remedy of the state for an infraction of its penal and punitive laws lies in a proper prosecution for the enforcement of the penalties and punishment prescribed by the statute.

But the petitioners seek an injunction, not against the commission of an offense by any of the defendants, but ask that the county commissioners be restrained from permitting the other defendants to use the Memorial building for purposes which are in violation of penal statutes.

Section 2921, General Code, permits the prosecuting attorney to seek a restraining order against the completion of an illegal contract not fully completed, and the plaintiffs in this action have the same right as the prosecuting attorney, he having failed to bring the action.

The court is clear that whatever may be the rights of the commissioners to lease the building for various forms of entertainment, that they have no right as trustees of the real owners

of the building, who are the public, to lease it to those who publicly announce that they intend to use it in the violation of a penal statute.

The Legislature has declared that a theatrical entertainment shall not be given on Sunday, and the commissioners are without authority to enter into a contract to permit public property to be utilized in the violation of law.

The people of Ohio believe in the observance of Sunday and have embodied that belief in a statute law, and they are justified in insisting that public property shall not be used for the purpose of giving a Sunday theatrical entertainment.

The exhibition of moving pictures being legal on other days of the week than Sunday, the court is of the opinion that the commissioners have a right to lease the building for that purpose, and the prayer of the petition asking for an injunction against the commissioners, so far as the same affects the use of the building on other days of the week than Sunday, will be denied; but an injunction will be allowed as prayed for restraining the county commissioners from permitting the use of the building for a moving picture entertainment on Sunday, February 3d, and Sunday, February 10th.

The question was not raised as to what effect the illegal portion of the contract of rental would have upon the entire contract.

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In re Will of Helen Schrader.

**PROBATE OF WILL NOT DEPENDENT ON THE CHARACTER
OF THE DEVISES MADE.**

Probate Court of Hamilton County.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTA-
MENT AND CODICIL THERETO OF HELEN SCHRADER, DECEASED.

Decided, February, 1918.

*Wills—Devise to Alien Enemy Not a Ground for Refusal to Probate—
Admission of, or Refusal to Admit, a Will to Probate and Record
Entirely Governed by Requirements of Section 10519, General Code
—The Validity of Any Devise Can Not be Adjudicated by the Pro-
bate Court—Probate Prerequisite to Contest—Power of Contest
and Construction Expressly Conferred Upon Court of Common
Pleas.*

1. There is no inherent power in the probate court to refuse to admit to probate a will on the ground that it contains a devise which is contrary to public policy, illegal or immoral, or that it gives aid and comfort to enemies with which the United States are now at war.
2. Probate courts have only such powers as are expressly given by statute.

LUEDERS, J.

A paper writing purporting to be the last will and testament and also a codicil thereto of Helen Schrader, deceased, is presented to this court for the purpose of admitting same to probate and record.

The witnesses to said will and codicil thereto testify that said Helen Schrader, at the time of the signing of said will and codicil, was of sound mind and memory, and under no undue influence or unlawful restraint; that she was more than eighteen years of age, and had published and declared said paper writing to be her last will and testament and also her codicil thereto; that the same were signed in their presence, and that they as witnesses signed their respective names in her presence, at her request, and in the presence of each other. That said Helen

Schrader has departed this life, and died a resident of Cincinnati, Hamilton county, Ohio.

It appears that all other requirements of the statute as to the making of a will and codicil and to admit the same to probate have been complied with.

In making disposition of her property she devises the sum of one hundred dollars to one Herminie Witthauer, or to her son, Karl Witthauer, both residing in Germany; and by Item 8 of said will she makes the following disposition:

"I give, devise and bequeath all and entirely the rest and remainder of my property of every kind, real, personal or mixed, wherever situated, wherever and whenever acquired, to the Chancellor of the German Empire, in trust, to be received, used, expended or distributed by him in his official capacity at his best discretion, for the benefit, assistance and comfort of needy German soldiers, who are or shall become maimed, injured or crippled in the war now in progress, their widows or orphans. My said trustee shall be excused from rendering bond or accounting, except as may be the required routine of his office administration in Germany in the execution of his trust."

Said will is dated July 18th, 1916.

A codicil to said last will and testament reads as follows:

"My last will wishes deposited as in probate court, I don't wish opened until six months after the end of the European war. My belongings that are now with my friend, Mrs. Lubbing, shall belong to her. Also the \$1,000 Mascot Mine Bond of Idaho, which is in my safety deposit box. The rest of my affairs are taken care of in my other will."

This codicil bears the date of December 16th, 1917.

Probate of this will and codicil is resisted by the nephew and niece of said Helen Schrader, and they contend that as this government was, at the time of the death of Helen Schrader, and is now, at war with the Government of Germany, that the residuary devise under Item 8th of the will is contrary to public policy, illegal, immoral, and if said will is admitted to probate will give aid and comfort to the enemies of this government in violation of Section 3, Article III of the Constitution of the United States, which reads as follows:

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“Art. III, Sec. 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”

And for that reason probate of the will and codicil should be refused. By this contention it is sought to contest the validity of certain bequests.

The first inquiry will be, is there power in this court inherent or by statute to declare upon an application to admit to probate a will, that a devise therein is against public policy, illegal, immoral or that it gives aid and comfort to the enemies of the United States and therefore, or for any other reason, refuse probate of the same.

No one will contend that there is a statute which expressly confers such powers. The probate court is a court of limited jurisdiction deriving all its powers from the statutes. In the exercise of such powers it is supreme, and it must follow that every inherent right which it possesses must be inseparable from such statutes, but essential in the exercise of the powers expressly conferred; beyond the statutes there can be no powers vested in this court. The right to admit or refuse to admit a will to probate is expressly conferred by statute upon this court. Section 10519 of the General Code provides:

“If it appear that such will was duly attested and executed, and that the testator at the time of executing it was of full age, sound mind and memory and not under restraint, the court shall admit the will to probate.”

Conferring power, therefore, upon this court to admit wills to probate when Section 10519 has been complied with, does not enlarge the jurisdiction of this court so as to declare a devise in any way illegal, immoral or void.

In this case the court having found that all the requirements of the statute were complied with, the will must be admitted to probate, and there the power of this court ends.

It must be remembered that this is an application to admit the will to probate—not a contest of the will. The application to make probate of a will is not included in the definition either

of an action or suit. It belongs neither to the common law nor equity jurisdiction of our courts, but appertains to the ecclesiastical jurisdiction of the English courts which is expressly conferred upon our probate courts. The proceedings to make probate of a will are in a sense *ex parte*, not adversary. No one is necessarily before the court other than the party applying to prove the will. No judgment is given.

The admission to probate of a will is only *prima facie* evidence of its validity and its contents and becomes conclusive only after the statutory period for a contest. Then again probate is prerequisite to a contest, the power of a contest being expressly conferred upon the court of common pleas, and the mode prescribed by statute.

It will be observed that every contest (if that term may be used), upon the application to admit a will to probate, relates to the requirement of Section 10519 of the General Code above quoted, and not to the validity of any devise contained in such will.

Then again this will contains devises not affected by the contention made to Item 8.

It will not be contended that the will may be admitted to probate in part and rejected in part; a will must be either admitted or rejected in its entirety.

The probate of this will preserves to all parties in interest their respective rights, and also their day in court. A refusal to admit this will to probate would be a denial of such rights.

The testatrix in her codicil expressed a wish that her will be not probated or opened until six months after the end of the present European war. This is merely a request to this court and of itself does not go either to the validity or invalidity of any devise, nor affect the powers of this court under Section 10519, General Code. This request will be disregarded for the reason that the property of the decedent must be taken legally possession of and preserved in the interest of creditors and legatees.

This can only be done by the appointment of some suitable person as administrator with the will annexed, the persons named in said will to administer said estate having declined to serve.

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Neither is this court concerned at this time as to the distribution of this estate to any legatee.

For the present the estate will remain under the control of this court and every payment will be subject to its order.

VALIDITY OF A SIDEWALK ASSESSMENT.

Common Pleas Court of Hamilton County.

JESSIE B. HUNT v. CITY OF NORWOOD ET AL.

Decided, July, 1917.

Sidewalk—Notice to Abutting Owner—Prerequisite to the Levying of a Valid Assessment—Sidewalk and Street Improvements Must be Made Under Separate Legislation.

A sidewalk improvement must be made under legislation distinct and separate from a street improvement, and notice to an abutting owner of intention to make a sidewalk improvement is prerequisite to the levying of a valid assessment upon his property.

W. F. North and Hicks & Hicks, for plaintiff.

O. F. Dwyer, Solicitor for Norwood, contra.

GEOGHEGAN, J.

The plaintiff is the owner of a lot of land at the corner of Buxton avenue and Turrill avenue in the city of Norwood, and she seeks to enjoin the collection of certain assessments for the improvement of Turrill avenue levied against her property by the municipal corporation defendant herein. She complains that she received no notice of the sidewalk improvement. She is a non-resident of the city of Norwood.

It appears that the city of Norwood on July 7, 1913, passed a resolution declaring it necessary to improve Turrill avenue from Buxton avenue to the eastern terminus of Turrill avenue, by grading, macadamizing, sodding the space between the sidewalks and the macadam, and constructing necessary cross-walks, culverts and drains, catch basins, sanitary sewers and artificial sidewalks on both sides of said street; and on the same day the

city council passed an ordinance declaring the necessity of and ordering the construction of artificial stone sidewalks and concrete steps on the south side of Turrill avenue from Buxton avenue to the eastern terminus.

It will be observed that both of these ordinances, the captions of which are only stated in substance, provide for the construction of artificial stone sidewalks. The first one is a general assessing ordinance; the second one proceeds under Section 3854, General Code, which requires the clerk of council to cause a written notice to be served upon the owners of land abounding and abutting on said proposed improvement, and provides further, that if said sidewalk is not constructed within fifteen days from the service of notice the director of public service be authorized to proceed to construct said sidewalk and assess the expense against the owner.

From the evidence I am satisfied that no service of said second ordinance was ever made upon the owner of this property, the plaintiff herein. The clerk of council is able to furnish satisfactory evidence of the service of the first ordinance, but is not able to furnish any evidence other than a statement that all things were done as required by law as to the second ordinance. Mrs. Hunt denies receiving any notice of the second ordinance.

A sidewalk improvement must be made under legislation which renders it distinct and separate from a street improvement, and under the rule laid down in *Hunt v. Hunter et al*, 11 C. C., 69, and *Schmidt v. Elmwood Place*, 15 C. C., 351, the sidewalk assessment herein must be enjoined for the failure to serve notice as required by law.

The only other question remaining in the case is as to whether or not the amount of the assessments other than the sidewalk levied against this property exceeded its special benefits. Mr. Moessinger, who testified, said that the benefit accruing to the property by reason of the street improvement was \$100. Mr. Leininger, who testified for the city of Norwood, testified that the entire benefit both from street and sidewalk was \$700, but he did not attempt to separate the benefit accruing by reason of the sidewalk from the benefit accruing by reason of the street im-

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provement, and his testimony is somewhat confusing as to whether he means that the \$700 is the special benefit accruing by reason of the improvements, or that he includes in that sum an enhancement in value caused by general neighborhood conditions since this improvement was made.

However, after viewing the property and considering all the evidence and circumstances of the case, I consider the sum of \$250 as a fair sum to assess for the benefit accruing to this property, and therefore an order will be made enjoining the assessments sought herein, except as to the street improvement, which will be limited to \$300.

**RIGHTS OF CHILDREN UNDER A WILL WHICH ENTAILED
LAND BUT WAS SET ASIDE.**

Common Pleas Court of Licking County.

MARY JANE HARRIS V. JAMES T. MAHOLM ET AL.

Decided, 1918.

Wills—Children of One to Whom Land is Entailed—Are Necessary Parties to an Action to Set the Will Aside—Land so Entailed Afterward Sold Under Foreclosure Proceedings—Title Good in the Purchase and Interest of the Children is Transferred to the Fund.

1. Where, by the terms of the will, lands are entailed to a son and the heirs of his body, and the son brings suit to contest such will, his children then in being are "interested persons" within the meaning of Section 12080 of the General Code; and such children as survive their father will not be bound by a judgment setting such will aside in a proceeding to which they were not parties.
2. The fact that such children during the lifetime of their father, brought suit to vacate the judgment setting aside such will, and a demurrer to such petition was sustained and the petition dismissed by the court, will not bar such children from claiming under such will, after the death of their father.
3. A decree in foreclosure of a mortgage on such lands, given by the testator, and a sale thereunder, conveys title to the purchaser free of the claim of such children, and the rights of such children are transferred to the fund arising from such sale.

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4. A decree in foreclosure of a mortgage upon such lands, given by such son, upon a cross-petition to which these children were not parties, will not be binding upon such children.
5. The rights of these children did not become vested until the death of their father in 1905, and therefore their claim to the land would not be barred by the statute of Limitations. Whether a claim to the funds arising from the sale of such lands would be barred, is not decided.

Jones & Jones, for plaintiff.

Kibler & Kibler and ——— *Fitzgibbin*, for defendants.

BLAIR, J. (Knox County).

The second item of the will of James Maholm reads as follows:

“Item 2. I devise and bequeath to my son, Thomas T. Maholm, and to the heirs of his body forever, the farm that he now resides upon, southwest and adjoining the village of Chatham, containing 195 acres more or less: for description of said farm see deed from Ashelman, now on record in the recorder’s office of Licking county, Ohio; the design of this item 2d is to confine the title of this farm to my son Thomas, and to his children and to their heirs down the same line forever.”

This will was duly admitted to probate and record in the Probate Court of Licking County, Ohio, and in 1870, and within the time allowed by law this son, Thomas T. Maholm, filed suit in the Court of Common Pleas of Licking County to contest such will, and as a result procured a verdict of a jury and judgment of the court setting the will aside.

Thereupon the brothers and sisters of Thomas gave Thomas quit-claim deeds to the farm described in item two of their father’s will; and Thomas in turn quit-claimed all his interest in other tracts to his brothers and sisters. By the terms of his will, the father had made provisions for the other children substantially as he had for Thomas, *i. e.*, he had entailed certain lands to each of the other children and the heirs of their bodies, but in somewhat different language from that used in the entailment to Thomas and the heirs of his body.

As a result of the judgment setting aside the will, and the quit-claim deeds, the children took and held the same parcels of land respectively as were devised to them by their father’s will,

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the title thus obtained being more to the liking of these children than the one conferred upon them by the will of their father. In fact, the real object and purpose of the will contest and quit-claim deeds seems to have been to defeat the entailments.

That such was the object and purpose of these children is borne out by the fact that they had such an understanding and agreement among themselves before the will contest was heard, and no effort was made by any of them to sustain the will.

Thomas thereafter mortgaged this land to the Michigan Mutual Life Insurance Company, and later this company purchased the same at sheriff's sale, in a suit brought to foreclose a mortgage which had been given by the testator, James Maholm, and in which suit this insurance company was a party defendant, and set up its mortgage given by Thomas. Title to these lands is now claimed by the defendants, Blime and Hunter, through deeds from this insurance company.

Thomas died in the year 1905, and the plaintiff here, who is a daughter of Thomas, now seeks partition of this land among the four children of Thomas who survive him, claiming title under their grandfather's will. The defendants, Blime and Hunter, claim that plaintiff and the other children of Thomas are barred from claiming title:

First. Because of the verdict of the jury and judgment of the court in setting aside the will of James Maholm.

Second. Because of the judgment of the common pleas and circuit courts of this county dismissing the petition in a suit brought by these children of Thomas, praying for the vacation of the judgment setting aside the will of their grandfather.

Third. Because of the judgment and sale in the suit of Patton against Maholm, this being a suit to foreclose a mortgage given by the testator, James Maholm, in his lifetime.

Fourth. Because of the statute of limitations.

I have considered these questions in the order in which they were presented. These four children of Thomas (plaintiff and her brothers and sister) were all in being and living with their father and mother at the time of the rendition of the judgment setting aside their grandfather's will (being then minors of ten-

der age), but none of them were parties to such proceeding. The one, James T. Maholm, was named as a defendant in the proceeding, ostensibly because of a small legacy left him by such will; but as the service of summons upon him was fatally defective (and as I recall no guardian *ad litem* was appointed) we may safely conclude that none of these children were parties to such suit.

Under these circumstances we are led to inquire, "Is this judgment binding upon these children?" In my judgment, this question must be answered in the negative. Under the will of their grandfather, and by virtue of Section 8622 of the General Code (R. S., 4200), the remainder in fee simple would pass to such of the children of Thomas as should survive him. It is my judgment that these children of Thomas were necessary parties to the will contest proceeding, and not having been parties, they are not in any way affected by the judgment.

Section 12080 of the General Code specifies who *must* be made parties to a petition to contest the validity of a will. It says:

"All the devisees, legatees, and heirs of the testator and *other interested persons*, including the executor or administrator, *must be made parties to the action.*"

It is claimed on behalf of the defendants, the Blimes and Hunters, that these children of Thomas were not "interested parties" such as is contemplated in this section of the General Code; that inasmuch as they had no vested interest they would not come within the meaning of the statute; that in all proceedings involving an estate tail, the first tenant in tail represents his issue as well as himself, and that therefore the children or issue of Thomas were represented by Thomas in this proceeding.

There are some old authorities which at first glance would seem in a measure to support such doctrine, but on closer examination we find such doctrine to have been recognized in cases where the interests of the first donee in tail and that of his issue were identical. In the case at bar it is very different. The position which Thomas took in the will case was antagonistic to the interest of his children. His own issue were in fact the only par-

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ties he was fighting. Had Thomas tried to uphold his father's will and thereby sustain his own as well as his children's title there would be some reason in claiming that he represented his children in such suit. He was trying to establish his own title as heir and thereby defeat his children or issue of their rights under the will.

I think the doctrine of representation by the first donee in tail against the policy of the law of Ohio. As reflecting upon this question, I cite Section 11925 and the following sections of the General Code which provide for the sale of entailed lands. Section 11926 provides as follows:

"All persons in being who are interested in the estate, or by the terms of the will, deed, or other instrument creating the entailment or other estate thereafter, or otherwise, shall be made parties to the action."

These sections were in force substantially in their present form at the time this will was set aside, and show clearly that the Legislature of this state recognized the issue of the tenants in tail as being "interested persons" when it comes to a disposition of an entailed estate, and that in such case the tenant in tail in no way represents his issue then in being.

Irrespective of any statute however, the idea of one person representing another whose interests are adverse to his is repugnant to every principle of our jurisprudence.

In the case of *Reams v. Wolls*, 61 O. S., 131, the court, in speaking of the statute giving to guardians the right to consent to a sale, on page 145 use the following language:

"But it does not follow from this that a guardian may assent for his ward in a proceeding *commenced by himself and in his own interest* and necessarily, as in this case, occupies a position *adverse to his ward*."

Counsel for the defendants, the Blimes and Hunters, rely upon the case of *Maholm v. Dryer*, decided by the circuit court of this district in 1904, and later affirmed by the Supreme Court without report in the 72 O. S., 679, as authority sustaining their contention that these children are bound by the judgment set-

ting aside the will of their grandfather. In this last cited case, the children of William C. Maholm, one of the testator's sons, sought to recover lands which had been devised in another item of the will by language somewhat similar to the language used in item 2 above quoted. The said William having sold this land in his lifetime and conveyed the same by warranty deed purporting to convey the fee simple thereof. The result of this case was a judgment against such recovery by the children of William. It is unfortunate that this case is not reported, neither the decision of the circuit nor of the Supreme Court—so we are left to surmise upon what theory this case was decided. However, the provision of the will then under consideration was quite different from item 2, the item being as follows:

“Item 3. I devise and bequeath to my son, William C. Maholm, and to the heirs of his body forever, a certain parcel of land (describing it). I design to vest the title of this parcel of land in my son, William C. Maholm, with the right in him to devise the same to either or all of his children and their children as he may desire.”

It is possible that the court construed this item as giving William a fee simple title.

Again, it is possible that the court held in that case that the children of William were represented in the will contest by their father. Upon the face of the record of the will contest, this son, William, did not occupy a position adverse to his children, for he was defendant in such proceeding and might be presumed to be interested in sustaining his father's will. In so far as the record shows, William, without his consent, was made a party defendant in such proceeding. His, as well as his children's, title under such will was assailed. At least it is not inconsistent with the record to assume that William would be interested in sustaining his father's will, and by so doing he would protect the rights of his children, while the position of Thomas was in every sense adverse to his children.

It is next claimed that the plaintiff and her brothers and sister are barred from claiming in this suit by reason of the judgment in the case of *Maholm et al v. O'Bannon et al.* This last

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mentioned case was a suit brought by the children of Thomas seeking to have the judgment vacating the will of their grandfather set aside, and was dismissed by the court as to all such children excepting as to James, and later the circuit court sustained a demurrer to the petition of James and dismissed such petition. I find nothing in the record of this case which in my judgment would bar them from making the claim they now make.

If I am correct in holding that the children of Thomas were not bound by the judgment setting aside their grandfather's will in the first instance, the refusal of the court to set such judgment aside would not give such judgment any more force or validity than it had in the first instance. If the judgment was void as to them, the refusal of the court to set it aside would not make it valid. The court did not hold the judgment setting aside the will to be a valid judgment; it only dismissed the petition. The sustaining of a demurrer to the petition and the dismissal of the same is not a final adjudication such as to bar the rights of these children. See *Moore v. Dunn*, 41 O. S., 62; *Rafferty v. Traction Co.*, 1 C.C.(N.S.), 538.

As to the case of *Patton v. Maholm*, I find the results more disastrous to the claim of plaintiff. This suit was for the foreclosure of a mortgage given by the testator, James Maholm, in his lifetime, and a sale upon such judgment would convey all the title which the testator had at the time of executing such mortgage; and the defendants, the Blimes and Hunters, take good title from the purchaser at such sale.

However, in so far as the judgment in this same case upon the cross-petition of the Michigan Mutual Life Insurance Company affects the rights of the children of Thomas, the same is void. These children were never made parties to such cross-petition. The mortgage to this insurance company was given by Thomas and could not affect the rights of these children for the reason that Thomas had no interest extending beyond his lifetime. The amount realized from this sale should have been applied as follows:

First. To the payment of the Patton mortgage and the costs.

Second. To the payment of the insurance company's mortgage to the extent of the interest which Thomas had in this land.

Third. The balance should have been placed in trust or otherwise preserved for the children of Thomas who should survive him.

The application of such balance by the purchaser, the insurance company, to the payment of its mortgage given by Thomas was illegal and void, and the court was without jurisdiction to make such order.

Whether this insurance company may yet be held as trustee of such fund I do not pretend to decide as that matter is not raised in the pleadings and this insurance company is not a party to this suit. However, the fact remains that these children of Thomas have been deprived of valuable rights given them by the will of their grandfather, and this has been done under the guise of legal proceedings and without these children having had "their day in court." For such illegal confiscation of their property there ought to be a remedy. Such fact, however, will not justify a disturbance of the title of the Blimes and Hunters. They take good title, and whatever rights these children had has been transferred to the funds arising from the sale of the land in the foreclosure suit of the Patton mortgage.

In view of this finding there remains no reason for considering the plea of the statute of limitations. However, the statute would not commence to run until the death of Thomas, which occurred in 1905, at which time the interest of these children became a vested one, and if they were not otherwise barred from claiming this land, they would not be barred by the lapse of time. An entry may be placed upon the journal of this court in accordance with this finding, adjudging the title to the lands in question to be in the defendants, Blimes and Hunters, as claimed in their answers respectively, and dismissing plaintiff's petition; motion for new trial, if made, to be overruled and exceptions noted, and the statutory time allowed for preparing and filing bill of exceptions and petition in error. If an appeal be taken, the appeal bond will be fixed at \$200.

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Bogen v. Bogen.

PROPERTY RIGHTS OF A DIVORCED COUPLE.

Common Pleas Court of Hamilton County.

WILLIAM BOGEN V. WILHELMINA BOGEN ET AL.

Decided, July, 1917.

Trust—Can Not be Grafted by a Divorced Husband—On Property Standing in His Wife's Name—Questions of Title Can Not be Litigated in a Subsequent Proceeding.

It is the policy of the law in Ohio that, in actions for divorce and alimony, all questions of property rights as between the husband and wife must be determined in the divorce and alimony proceeding; and a petition by a husband filed some years later, in which he seeks to engraft a trust upon property standing in his former wife's name, alleging as a reason therefor that the said property was enhanced in value by reason of what he contributed thereto out of his earnings during the marital relation, is open to demurrer. (*Bank & Trust Co. v. Bogen*, 115 O. 497)

James W. Pottenger and A. C. Shattuck, for demurrer.

G. R. Werner and Carl G. Werner, contra.

GEOGHEGAN, J.

Heard on demurrer to petition.

The plaintiff is the divorced husband of the defendant Wilhelmina Bogen, and seeks to engraft a resulting trust upon certain property appearing of record in the name of the said Wilhelmina Bogen.

The petition recites that certain premises on Harrison avenue in the city of Cincinnati were acquired by the defendant Wilhelmina Bogen as "part of the salvage in her name of part of the debt of her father to plaintiff's firm, out of the bankruptcy of her father's estate," and that the defendant Wilhelmina Bogen was enabled to erect a building on said premises in the sum of \$595 out of the earnings of the plaintiff, and that the property on Linden avenue was acquired by reason of the income derived from the Harrison avenue property, and that the title to the Linden avenue property was taken in the said Wilhelmina Bogen's name for their joint protection.

The plaintiff then recites that the defendant Wilhelmina Bogen obtained a decree of divorce against him in the insolvency court, which barred him from their home, and he now seeks to have a trust declared in his favor upon the premises described in the petition.

Assuming that, in so far as the allegations with reference to the manner in which the property was acquired, the plaintiff sets up a good cause of action, there is no question but what the allegation that a divorce was obtained from him by his wife on account of his aggression in the insolvency court of this county, renders his petition demurrable.

It has been the policy of this state to have settled in actions between the same parties all questions which might have been litigated in the case.

The rule is stated with absolute clarity in *Petersine v. Thomas*, 28 O. S., 597, in the first proposition of the syllabus:

“When a matter is finally determined in an action between the same parties by a competent tribunal, it is to be considered at an end, not only as to what was determined, but also as to every other question which the parties might have litigated in the case.”

It is plain from the reading of this petition that all matters sought to be determined herein could and should have been determined by the insolvency court in the divorce proceeding. At that time the insolvency court had jurisdiction in matters of divorce and alimony concurrent with the common pleas court. It would be more than passing strange that if, after the husband and wife had their day in court, and their respective rights adjudicated in the divorce proceeding, the husband could some years later come into the common pleas court and seek to have a trust engrafted upon property held of record in his former wife's name, alleging as his reason therefor that the property was enhanced in value by reason of what he contributed out of his earnings during the continuance of the marital relation. This is contrary entirely to the spirit and policy of the law governing such matters, and the demurrer will therefore be sustained.

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**JURISDICTION OF JUSTICES OF THE PEACE IN CUYAHOGA
AND FRANKLIN COUNTIES.**

Common Pleas Court of Cuyahoga County.

THOMAS H. FORBES V. THOMAS B. BOLTON ET AL.

Decided, March 11, 1918.

Justice of the Peace—Jurisdiction of, Over Persons Resident in Other Townships of the Same County—Validity of the Exception as to Jurisdiction, Which is Made Applicable to Cuyahoga and Franklin Counties—Evident Purpose of the Legislature to Stop Oppression by Outside Magistrates Through the Issue of Writs of Attachment.

1. The jurisdiction of a justice of the peace in an outlying township of Cuyahoga county is limited to the township in which he has been elected, and he is without authority to issue summons accompanied by a writ of attachment against a resident of the city of Cleveland, where neither the plaintiff nor the defendant are resident in the township for which the said justice was elected.
2. Whether a justice of the peace has any jurisdiction other than that provided in the act of April 28, 1913, giving him jurisdiction co-extensive with the county in certain criminal cases, and in civil cases as provided in the amendment to Section 10255 (107 O. L., 20), and whether it will be necessary for the Legislature to more definitely fix the duties, powers and jurisdiction of justices of the peace, *Quære*.

Thomas E. Green, for plaintiff.

R. H. Lee and *F. H. Crew*, contra.

LEVINE, J.

The facts in the case necessary to a determination of the question at hand are as follows:

The White Sewing Machine Company, on the 20th day of June, 1916, started an action on a claim of \$43 before Thomas B. Bolton, a justice of the peace in and for Rockport township, Cuyahoga county, against Thomas H. Forbes, both plaintiff and defendant being residents of Cleveland township, Cuyahoga

county. The White Sewing Machine Company filed a bill of particulars and an affidavit in attachment for necessities, naming the city of Cleveland as garnishee. Summons was issued by said justice of the peace of Rockport township, accompanied by an order of attachment, by delivering the same for service to A. E. Searle, constable, who returned the order of attachment endorsed, "Received this writ June 20th, 1916, and by virtue of its certified copy hereof to McBride, on June 21st, 1916, at 11 o'clock A. M., I served this order on the within named defendant by delivering a true and certified copy hereof with all endorsements thereon, to the within named defendant."

Judgment was rendered by default by said justice of the peace on the 29th day of June, 1916. On the 30th day of June, 1916, an order was issued on the city of Cleveland to pay the money held by force of the writ of attachment into court, which order was returned endorsed, "Money refused."

Later, on the 25th day of November, 1916, the White Sewing Machine Company caused to issue upon said judgment so rendered proceedings in aid of execution against the plaintiff's personal earnings with the Cleveland Telephone Company, of the city of Cleveland, and sought to satisfy its judgment by said proceedings.

The plaintiff herein, Thomas H. Forbes, brings this action to enjoin the justice of the peace and the other defendants from further proceeding on said judgment, and prays that said judgment and attachment be declared null and void.

I have omitted other facts not necessary to a determination of the question presented to the court.

Plaintiff's contention is, first, that the justice of the peace was without jurisdiction to issue the summons and the writ of attachment; second, that he was without jurisdiction to render judgment in the case of *The White Sewing Machine Co. v. Thomas H. Forbes*; and, third, that the whole proceeding before said justice of the peace was null and void and without force of law.

The gist of the plaintiff's contention is, that under the law as it now stands, the jurisdiction of justices of the peace in the outlying townships of Cuyahoga county is confined to the town-

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ships for which they were elected, and that a justice of the peace elected in any of the outlying townships of Cuyahoga county is without jurisdiction to issue summons accompanied by a writ of attachment against a resident of the city of Cleveland when neither the plaintiff nor the defendant reside in the township for which the justice had been elected.

Reference is made to Sections 10224 and 10225 of the General Code of Ohio, which define the jurisdiction of justices of the peace in certain cases. These sections read as follows:

"Section 10224. Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority:

"1. To administer an oath authorized or required by law to be administered;

"2. To take the acknowledgment of deeds, mortgages and other instruments of writing;

"3. To solemnize marriages;

"4. To issue subpoenas for witnesses and coerce their attendance in causes or matters pending before them, or other cause or matter wherein they are required to take depositions;

"5. To try the action of forcible entry and detention or the detention only of real property, except that in Cuyahoga and Franklin counties the jurisdiction and authority of justices in such case is limited to the townships for which they are elected;

"6. To proceed against security for costs and bail for the stay of execution on their dockets;

"7. To issue attachments and proceed against the goods and effects of debtors in certain cases, except that in Cuyahoga and Franklin counties the jurisdiction and authority in such cases is co-extensive only with the township for which the justice was elected. When such justice has jurisdiction of the defendant because he resides in the township for which the justice was elected or otherwise as provided in the next following section, his jurisdiction in attachment shall be co-extensive with the county;

"8. To issue execution on judgments rendered by them;

"9. To proceed against constables failing to make return, making false return, or failing to pay over money collected on execution issued by such justice;

"10. To try the right of the claimant to property taken in execution or attachment;

"11. To act in the absence of the probate judge in the trial of contested elections of justices of the peace;

"12. To try actions against other justices of the peace for refusing or neglecting to pay over moneys collected in their official capacity, where the amount claimed does not exceed one hundred dollars. Nothing in this clause shall deny or impair any remedy provided by law in such case by suit on the official bond of such justice of the peace, or by amercement or otherwise, for such neglect or failure to pay over money so collected."

"Section 10225. Except as provided in the next preceding section, no householder or freeholder resident of the county shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides, except in the cases following:

"1. When there is no justice of the peace for the township in which the defendant resides;

"2. When the only justice residing therein is interested in the controversy;

"3. When he is related as father, father-in-law, son, son-in-law, brother, brother-in-law, guardian, ward, uncle, nephew, or cousin, to either of the parties, and there is no justice in the township competent to try the cause in the foregoing excepted cases, the action may be brought before any justice of an adjoining township of the same county. The justice must state on his docket the reason for his taking jurisdiction;

"4. When the summons is accompanied with an order to attach property the jurisdiction is co-extensive with the county, except as otherwise specially provided;

"5. When two or more persons are jointly, or jointly and severally bound in a debt or contract, or otherwise jointly liable for the same action, and reside in different townships of the same county, the plaintiff may commence his action before a justice of the township in which any of the persons liable resides. In joint actions against the makers and endorsers of notes, due bills, or bills of exchange, the action must be commenced in the township wherein it is claimed by the plaintiff that an endorser endorsed the note or bill at the time it was made, and the jurisdiction depends thereon. Before the justice takes jurisdiction in such case, the plaintiff, or a person for him, shall file an affidavit setting forth that fact;

"6. In cases of trespass to real or personal property, the action may be brought in the township where the trespass was committed, or in the township where the trespasser, or one of the several trespassers, resides."

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So that by Section 10224 it is provided that justices of the peace, in and co-extensive with their respective counties, shall have jurisdiction and authority to issue attachments and proceed against the goods and effects of debtors in certain cases, except that in Cuyahoga and Franklin counties the jurisdiction and authority in such cases is co-extensive only with the township for which the justice was elected; and in Section 10225 it is provided that when the summons is accompanied with an order to attach property, the jurisdiction is co-extensive with the county, *except as otherwise specially provided*.

Counsel for the defendant refer the court to the case of *Oakman v. Rose Furniture Company*, 10 C.C.(N.S.), 247, wherein, on October 21st, 1907, the Circuit Court of Cuyahoga County held that the amendment of Section 584, Revised Statutes, passed April 18, 1894 (93 O. L., 146), excepting Cuyahoga and Franklin counties from the general provision of said section as to the jurisdiction of justices of the peace in attachment cases, is unconstitutional and that justices of the peace in said counties, as well as in all the counties of the state, have jurisdiction co-extensive with the counties to issue attachments and proceed against the goods and effects of debtors in certain cases.

The plaintiff replies that the above cited decision was rendered on October 21, 1907; that it referred to a provision altogether different in language from the provision now contained in Section 10224, General Code. The General Code, including that provision, was adopted in 1910 on a date subsequent to the date of the circuit court decision, and since the adoption of the General Code, including Section 10224, no decision has been rendered by any court of competent jurisdiction declaring the same unconstitutional; and that on April 18, 1913, the state Legislature enacted Section 1711-1, which re-establishes the office of justice of the peace as a legislative office and defines its jurisdiction, powers and duties. (103 O. L., 214.)

Particular reference is made to the following language contained in said section:

“The jurisdiction, powers and duties of said office and the number of justices of the peace in each such township shall be

the same was provided by the laws in force on September 3, 1912. All laws and parts of laws in force on said date in any manner regulating such powers and duties, fixing such jurisdiction or pertaining to such office or the compensation thereof, are hereby declared to be and remain in force until specifically amended or repealed, the same as if herein fully re-enacted."

The plaintiff contends that the phrase, "all laws in force on September 3, 1912," is sufficient to include the entire Sections 10224 and 10225 as they now appear in the General Code; that it was the intent of the Legislature to re-enact all the provisions found in the General Code of Ohio relating to justices of the peace which have not been repealed by the Legislature.

It can not be disputed that, under the present amendments to the Constitution, the provision of the General Code limiting justices of the peace to their own townships in Cuyahoga and Franklin counties would be held constitutional.

This question was decided in the case of *In re Hesse*, 93 O. S., 230.

Plaintiff therefore urges that, since it was within the power of the Legislature to re-enact the entire Section 10224 of the General Code, including the provision relating to Cuyahoga and Franklin counties, they intended to re-enact the same in its entirety, and that the phrase, "laws in force on September 3, 1912," means all laws appearing on the General Code which had not been repealed by the Legislature.

There were other questions discussed by counsel which are not necessary to a determination of the question now before us, and they will, therefore, be omitted.

This court deems it its duty to briefly state the history of this legislation relating to the jurisdiction of justices of the peace in Cuyahoga and Franklin counties.

In the case of *Oakman v. Rose Furniture Company*, 10 C.C. (N.S.), 247, decided October 21, 1907, the court said:

"Previous to April 19, 1898, such jurisdiction was undoubted, for Section 583, Revised Statutes of Ohio, then read:

"Justices of the peace within and co-extensive with their respective counties shall have jurisdiction and authority: * * *

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7. To issue attachments and proceed against the goods and effects of debtors in certain cases.'

"On the date mentioned, however, the Legislature amended said section by adding the following language to said paragraph seven:

" 'Except in counties containing a city of the second grade of the first class, or of the first grade, second class, the jurisdiction and authority in such cases is co-extensive only with the township for which the justice was elected, but when said justice has jurisdiction of the defendant because he resides in the township for which said justice was elected, or otherwise, as provided in Section 584 of the Revised Statutes, the jurisdiction in attachment shall be co-extensive with the county.' (93 O. L., 146.)

"It needs no citation of authorities to show that it was beyond the powers of the Legislature to exempt Cuyahoga and Franklin counties from the operation of the general law on the jurisdiction of justices of the peace in attachment cases.

"This amendment was unconstitutional."

It is necessary that we understand the reason for the legislative enactment aiming to except certain counties from the provision of the General Code relating to the jurisdiction of justices of the peace.

In the case of *Fisher v. Garey*, 11 O. D., 796, 797, decided in 1901, in commenting upon the above cited provision, the court has this to say:

"Before this law was passed matters had got to a bad system. It was a system of hold-up. If a man wanted to give his neighbor plenty of trouble, he would go into the country and bring an action dragging his neighbor out of the city. In fact, it did not require him to go into the country. Justices came to the city and issued attachments while in the city."

This is but a mild commentary on the justice court situation in counties containing large cities. The fact is the historic and honorable office of justice of the peace has been so changed and corrupted that the machinery of justice in those offices is operated for revenue only. Justices of the peace elected in the outlying townships of Cuyahoga county have established offices in the business portion of the city of Cleveland; a large number of

collectors and hangers-on have spread over the city stirring up litigation, often not without the knowledge and consent of the justices, who reward their efforts by appointing them as special constables in all cases brought by them into court, and allow them fees, not infrequently exorbitant, for their various services, at the expense of the litigant. Residents of Cleveland are subject to the civil and criminal jurisdiction of justices and constables in whose election they have no voice. These conditions were made known to the Legislature, and the provision above cited, as enacted April 19, 1898, aimed to bring relief to the large cities of this state from the oppression practiced by justices of the peace. In other words, it aimed to secure to the cities of Cleveland and Columbus a representative form of government as to justice of the peace courts, and sought to establish the principle of home rule in the administration of such courts.

It can not be doubted, even without an enumeration of instances of bad practices and oppression in said courts, that upon the very face of it an evil exists: Justices of the peace elected in their respective townships of Cuyahoga county by the citizens of such townships owe it to their constituents to remain within such townships and administer law and justice within such townships. When a justice of the peace sees fit to leave the township for which he was elected and establishes an office in the city of Cleveland wherefrom he operates and exercises civil and criminal jurisdiction over the people of Cleveland, he is, to say the least, committing an immoral act. The people of the township who elected him are entitled to his full services in the office to which he was elected. The people of Cleveland, never having had any part in the election of such justice of the peace, and being unable to rid themselves of such justice of the peace if he proves inefficient or corrupt, have, to say the least, a grave complaint. It conflicts with the essential principle of representative government, which leaves it to the people to elect their own officials, and to defeat them when they prove unworthy or corrupt.

This information was undoubtedly before the Legislature when they passed the above cited provision on April 19, 1898.

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It will be seen that while the case of *Oakman v. Rose Furniture Co.* is held to be unconstitutional, the ground for such holding does not clearly appear. The decision contains the following language: "It needs no citation of authorities to show that it was beyond the power of the Legislature to exempt Cuyahoga and Franklin counties from the operation of the general law on the jurisdiction of justices of the peace in attachment cases." While the ground of this decision is not mentioned in the opinion, it undoubtedly was that such a law would, in the opinion of the court, violate Section 26, Article II of the Constitution of 1851 as it then existed, which provided that, "All laws of a general nature shall be of uniform operation throughout the state." At that time justices of the peace were constitutional officers established by express mention in the Constitution of 1851. Article IV, Section 1, is as follows:

"The judicial power of the state is vested in the Supreme Court, the circuit court, court of common pleas, courts of probate, justices of the peace, and such other courts inferior to the Supreme Court as the General Assembly may from time to time establish."

Section 9 of the same article provides:

"A competent number of justices of the peace shall be elected by the electors in each township. Their term of office shall be three years, and their powers and duties shall be regulated by law."

It was apparently the opinion of the circuit court that, since justices of the peace are constitutional officers, and since the function of the Legislature is merely to regulate their powers and duties, therefore whatever law the Legislature passes regulating the powers and duties of the office of justices of the peace is subject to Section 26, Article II of the same Constitution, and that therefore a law relating to justices of the peace, being of a general nature, must have uniform operation throughout the state.

In 1910 the Legislature of Ohio adopted the General Code of Ohio. Section 583 of the Revised Statutes was given a new

number, namely, Section 10224. The provision relating to the jurisdiction of justices of the peace in Franklin and Cuyahoga counties was changed, and instead of referring to counties containing cities of certain grades, the codifiers inserted the provision, "Except that in Cuyahoga and Franklin counties the jurisdiction and authority in such counties is co-extensive only with the townships in which the justice was elected."

The General Code in its entirety was adopted by the Legislature. I can find no reported decision of any kind where the provision of Section 10224 relating to the jurisdiction of justices of the peace in Cuyahoga and Franklin counties was passed on by any court, or where its constitutionality has been called into doubt, since the date of the adoption of the same in 1910.

In the year 1912 the constitutional convention was held to frame certain amendments to the Constitution of Ohio of 1851. That the people of Ohio were alive to the existing evil resulting from allowing justices of the peace elected in the outlying townships of counties containing large cities to exercise criminal and civil jurisdiction over the inhabitants of such large cities, appears from the lively discussion of the subject found in the debates of the constitutional convention. On February 29, 1912, the convention had before it the proposal entitled, "Abolition of Justices of the Peace in Certain Cities," and reading as follows:

"A competent number of justices of the peace shall be elected by the electors in each township in the several counties, until otherwise provided by law. Their terms of office shall be for four years, and their powers and duties shall be regulated by law; provided that no justice of the peace shall be elected in any township in which a court other than a mayor's court is or may hereafter be maintained with the jurisdiction of all causes of which justices of the peace have jurisdiction, and no justice of the peace shall have or exercise jurisdiction in such township."

The proponent of the above cited amendment was Mr. Fackler of Cuyahoga county. See pages 551-552, Debates, where Mr. Fackler, of Cuyahoga county, with careful minuteness, laid before the members of the constitutional convention the justice

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court evil existing in Cleveland. Mr. Fackler's remarks were as follows:

"In order that you may understand just what this proposal accomplishes, I will say that as the courts are now constituted it would have no effect outside of the city of Cleveland. In the city of Cleveland one of the abuses which we found is the abuse of the attachment process by country justices. A man is elected justice of the peace in a rural township and he opens an office in the city. He runs that office usually in connection with some collection agency, and for almost every cause he will issue an attachment against the wages of men, and it has gotten to be a source of great oppression on a poorer class of people. In order to meet this abuse, as well as to relieve the crowded docket of our common pleas courts, there has been established in the city of Cleveland municipal courts which have jurisdiction in all cases in which justices of the peace have jurisdiction, but also have jurisdiction of civil cases of a larger amount. The salaries of the men in those courts are \$4,500, and so a much better class of men are selected as judges of those courts than are selected as justices of the peace, even in the city of Cleveland. With the present agitation against our courts and our judicial system, it is important to have courts with which the people come in contact so organized as to command the utmost respect; and I do not believe that much can be engendered in the minds of our working people who come in contact with the country justice practicing in a large city. Under this proposal it would not affect any of the courts in any of the smaller counties; but we have a great evil in our city—and I suppose Cincinnati has it, too—of a country justice practicing in the city. Every time a case is filed the lawyers or collection agency will make an affidavit for an attachment, and the dissolving of the attachment doesn't take the jurisdiction away from the country justice, because our courts have held that even though an attachment is dissolved, the justice can continue with the case and decide it. So the attachment is used for this purpose, and men are arrested in large cities and hauled before the justice of the peace, and finally a settlement is reached when the man should not have been subjected to arrest at all for debt. I don't believe it is necessary to go into detail on this matter. This proposal as recommended will accelerate business and prevent abuse. That there is an abuse has been recognized by various proposals that have been introduced. One proposal I remember was introduced and provided that no justice of the peace should have jurisdic-

tion outside of the township in which he was elected. Of course, objection was made to that because in some townships it is necessary for the justice of the peace to have jurisdiction other than in that township. Why, some of the justices of the peace in Cleveland make as much as eight and ten thousand dollars a year. They issue twenty-five or thirty attachments in a day, and they get four dollars and eighty cents in each case. Recently a case came to our office. A boy working at one of the foundries had his wages attached and he was not able to draw any payment for two months, and it was on a claim for eleven dollars, and there were twenty-four dollars costs. There is nothing that will create in the minds of a poor class of people a greater contempt for a whole system of government than such things as that being allowed. This will stop it."

This amendment passed by almost unanimous vote. I am citing the same in order to indicate that conditions in the large cities resulting from the practices of the so-called country justice were brought to the attention of the constitutional convention, and that the members thereof were alive to such evil and sought to remedy the same.

On May 23, 1912, the same subject was up for consideration again before the constitutional convention. It was pointed out that the so-called Peck amendment to Chapter 4 of the Constitution, dealing with the judiciary of Ohio, aimed to eliminate all mention of justices of the peace from the Constitution, and to leave it entirely to the discretion of the Legislature as to what courts they will establish to take their place. On page 1771 of the debates is the following:

"MR. TAGGART: The object and purpose of the Fackler proposal is to prevent country justices of the peace opening offices in the city of Cleveland and similar cities and doing a justice of the peace business; but looking at the language of the proposal as read by the secretary and adopted by the committee on phraseology, it prohibits the justices of the peace in such places and it recognizes the office of justice of the peace as a constitutional office. Now, you can not have recognition of the office of justice of the peace in this proposal and have it stricken out in the judiciary proposal as proposed by Judge Peck."

Finally the convention agreed to the Fackler amendment above cited, but added thereto Schedule No. 1:

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“Resolved further, that in the event Proposal No. 184 passed by the convention be adopted by the electors of this state and become a part of the Constitution, then Section 9 of Article IV of the Constitution is repealed, and the foregoing proposal, if adopted, shall be of no effect.”

From the discussions to be found in the debates it becomes apparent that the members of the constitutional convention felt that full relief would be granted to the large cities of Ohio from the justice court evil in either event; that even if the Fackler amendment, under the operation of the above cited schedule, should become ineffective through the passage of the Peck amendment, which eliminates all mention of justices of the peace from the Constitution, the Legislature of Ohio would be fully empowered to grant such relief.

On September 3, 1912, the Peck amendment to Sections 1, 2 and 6 of Article IV, and the Fackler amendment to Section 3 of Article IV were both submitted to the people. Both passed by a substantial majority of the votes of the people of Ohio. The vote cast for the Fackler proposal in counties containing the large cities was overwhelming. At the same time the schedule to the Fackler amendment of Section 9 was also passed, which provided that “if the amendment to Article IV, Sections 1, 2 and 6, be adopted by the electors of this state, and become a part of the Constitution, then Section 9 of Article IV of the Constitution is repealed and the foregoing amendment, if adopted, shall be of no effect.” The effect of the schedule was to render the Fackler amendment ineffective, and to eliminate all mention of justices of the peace from the Constitution of Ohio.

I have cited the foregoing discussion found in the debates in order to indicate that one of the purposes of eliminating all mention of justices of the peace from the Constitution was to enable the Legislature to deal with the subject as it deemed wise and necessary.

In the case above referred to, *In re Hesse*, 93 O. S., 230, the question arose before the court as to whether Sections 41 and 43 of the act passed May 2, 1913 (103 O. L., p. 279), numbered

in the General Code as Section 1581-41, etc., was a valid enactment. The act in question was the act establishing a municipal court in the city of Cincinnati. One of the provisions contained therein is:

"That no justice of the peace in any township in Hamilton county, other than in Cincinnati township, nor the mayor of any village already existing, shall have jurisdiction in any criminal proceeding in which a warrant or order of arrest or other process, except subpoena for witnesses, shall have been served upon a citizen or resident of Cincinnati, unless such service be actually made by personal service within the township, village or city in which said proceeding may have been instituted, or jurisdiction in criminal matters unless the offenses charged in the warrant or order of arrest shall have been committed within said township, village or city."

Another provision therein contained is:

"That no justice of the peace in and for Cincinnati township shall have jurisdiction to issue any warrant or order of arrest or other criminal process."

By force of these provisions the jurisdiction of justices of the peace outside of Cincinnati township over criminal matters is limited to offenses committed within their respective townships.

On page 232 of the Hesse case, *supra*, the Supreme Court of Ohio has this to say:

"There can be no objection to the constitutional validity of these provisions. Although Section 26 of Article II of the Constitution imposes a limitation upon the legislative power in requiring all laws of a general nature to have uniform operation throughout the state, yet it seems to be settled that Section 1, Article IV, authorizing the establishment of inferior courts, being a special grant of legislative power upon a particular subject, the General Assembly is vested with full power to determine what other courts it will establish, local if deemed proper, either for separate counties or districts, and to define their jurisdiction and power. It is to be observed that the jurisdiction of no constitutional court is invaded by the sections of the municipal court act under consideration. They abridge and limit the jurisdiction of a statutory court only."

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The above cited case settles finally the question as to the power of the Legislature to limit the jurisdiction of justices of the peace in certain counties to the townships for which they were elected, in either civil or criminal cases. The very effect which the framers of the amendment to Article IV of the Constitution sought to give to it was clearly carried out in the above cited decision. There can be, therefore, no question but that it was within the power of the state Legislature to incorporate the provision relating to the jurisdiction of justices of the peace in Cuyahoga and Franklin counties into the laws governing the jurisdiction, powers and duties of justices of the peace.

On April 18, 1913, the Legislature of Ohio passed Section 1711-1 of the General Code:

“That there be and is hereby established in each of the several townships in the several counties of the state of Ohio, except townships in which a court now exists or may hereafter be created having jurisdiction of all cases of which justices of the peace have or may have jurisdiction, the office of justice of the peace.

“The jurisdiction, powers and duties of said office, and the number of justices of the peace in each such township shall be the same as was provided by the laws in force on September 3, 1912. All laws and parts of laws in force on said date, in any manner regulating such powers and duties, fixing such jurisdiction or pertaining to such office or the incumbents thereof are hereby declared to be and remain in force until specifically amended or repealed, the same as if herein fully re-enacted.

“Section 2. This act shall take effect at the earliest period provided by law.”

The purpose of this undoubtedly was to re-establish the office of justice of the peace as a legislative office, since on January 1, 1913—the date when the amendment to the Constitution became effective—the office of justice of the peace ceased to be a constitutional office.

The Legislature is presumed to carry out the intent of the framers of the amendment to the Constitution and of the people of Ohio who approved the same.

The question now arises as to the intent of the Legislature and the meaning which they sought to give to the phrase, “the laws

in force on September 3, 1912." Did the Legislature intend to exclude from the General Code the provision relating to the jurisdiction of justices of the peace in Cuyahoga and Franklin counties, and which limits them to their own township in attachment cases? Or did the Legislature intend to include the same as being part of the General Code and not having been repealed by the Legislature?

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. Where the language of the statute is of doubtful meaning, or where an adherence to the strict letter would lead to injustice, the duty devolves upon the court of ascertaining the true meaning. If the intention of the Legislature can not be discovered, it is the duty of the court to give the statute a reasonable construction consistent with the general principles of law. The language of the Legislature must be understood in the light of the intention which the Legislature had, and not according to the technical meaning of the language, unless the language used had a recognized technical meaning and deals with technical subjects.

In order that we may hold that the Legislature intended to re-enact all the laws relating to the powers, duties and jurisdiction of justices of the peace, and to except the provision limiting justices of the peace to their own townships in Cuyahoga and Franklin counties, because they deemed the same not in force on the date of September 3, 1912, we shall be obliged to say that, despite the fact that there was no judicial determination of the question as to whether or not the above provision relating to justices of the peace in Cuyahoga and Franklin counties was constitutional since the date of its passage as a part of the General Code of Ohio in 1910, that nevertheless the Legislature sat in judgment and held the same as unconstitutional when viewed in the light of the old Constitution, and therefore sought to eliminate the same from the justice court code.

The interpretation of the phrase "in force" is discussed in the case of *In re Denison and Wright*, reported in the 19th Ontario Law Reports, page 5, decided in 1909. In that case the court has under advisement a provision of the law written as follows:

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"In case a village is incorporated, the by-laws in force therein shall continue in force until repealed or altered," etc.

In this case the court held that the words "in force" mean "having the force of law" or "being in existence." On page 7 the court has this to say:

"The words 'in force' are used in various parts of the statute law of this province, and not always, as I think, in the same sense, and the meaning to be attached to them must be gathered in each case by a consideration of the subject-matter to which they relate."

The by-law in question, by its terms, was to come into operation and be of full force and effect only on and after the next first day of May. It was nevertheless an existing law of the municipality.

A law may be said to be in force when it is not repealed, or, more loosely, when it can be carried into practical effect. Bouvier's Law Dictionary.

In the case of *Allen, Ball & Co. v. Mayor*, 9 Ga., 280, the court holds that—

"A statute of the state declaring in full force all the ordinances of a city or other corporation in operation at its date, does not embrace one which has been judicially pronounced by the superior court, and which judgment is afterwards affirmed by the Supreme Court, to be inoperative before its passage."

The ordinance in question was passed by the city of Savannah the 11th day of November, 1842, and entitled, 'An ordinance amendatory of and in addition to the tax ordinance in the city of Savannah, etc. This ordinance, at the May term, 1849, of the superior court, was declared by said court as inoperative. The same was later affirmed by the Supreme Court upon writ of error the January ensuing. The court therefore holds that that date when the ordinance became inoperative relates back to the time when the superior court declared the same inoperative, and that therefore the act of the General Assembly of December 8th, 1849, declaring in full force all and singular the

ordinances of the corporation of Savannah then in operation does not include the said ordinance which was judicially declared, before the date of the passage of the act of the General Assembly, as inoperative.

By inference, the court makes it clear that the phrase "in operation" would be broad enough to include all ordinances which have not been judicially declared invalid or inoperative before the date of the passage of the act of the General Assembly.

It has been held as a recognized principle that, after a constitutional convention is held to frame amendments to the existing Constitution, and the same are submitted to and approved by the people of the state, the Legislature is presumed to carry into effect the intent and purpose of the amendments.

It has also been held to be the universal rule that the acts passed by the Legislature are presumed to be constitutional and valid.

It is therefore reasonable to assume that the Legislature, in the act of May 18th, 1913, which re-established the office of justice of the peace and re-enacted the law relating to his powers, duties, etc., meant by the use of the phrase, "laws in force on September 3d, 1912," to exclude a law found in the General Code on that date which has not been declared invalid or unconstitutional since the date of its passage? Is it reasonable to assume that the Legislature presumed the same to be unconstitutional and meant to exclude the same from the force of the re-enacting act of May 18, 1913? Is it not the more reasonable to say that the Legislature was fully aware of the evils arising from the practices of country justices resulting from the exercise of criminal and civil jurisdiction by said officers over the people of large cities who had no voice in their election? Is it not the more reasonable to say that the Legislature knew of the history of such legislation, and of the motives and purposes which prompted the Legislature at various times to effect a remedy? Is it not the more reasonable to say that they knew of the purposes which prompted the framers of the constitutional amendments submitted September 3d, 1912, when they eliminated all mention of justices of the peace from the Constitution and gave

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the Legislature full power to deal with the subject as it deemed wise? Can it be said that the Legislature was not aware of the fact that the Fackler amendment, which in express terms eliminates justices of the peace from the large cities having municipal courts, was approved by a substantial majority of the votes of the people of this state? While it is true that the people also voted for the schedule which made the same inoperative if the Peck amendment goes into effect, nevertheless it is indicative of the opinion of the majority of the people of this state as to what the law ought to be on the subject.

I therefore hold that the meaning and intent which the Legislature meant to give to the phrase, "laws in force on September 3, 1912," was such laws as appeared in the General Code of Ohio and which have not been repealed by the Legislature; in other words, laws in existence on the statute books. This is strengthened by a subsequent act of the Legislature passed February 27, 1917 (107 O. L., 20). The act, among other things, amends Section 10225.

"Section 10225. Except as provided in the next preceding section (meaning Section 10224) no householder or freeholder of the county shall be held to answer a summons issued against him by a justice in a civil matter in any township of such county other than the one where he resides, except in the cases following:

* * * * *

"4. When the summons is accompanied with an order to attach property the jurisdiction is co-extensive with the county, except as otherwise specially provided."

If the Legislature, in the act of April 18, 1913, Section 1711-1, intended to and did eliminate the provision relating to the limitation of justices of the peace to their townships in Cuyahoga and Franklin counties, as it appeared in Section 10224 of the General Code on September 3d, 1912, there could be no possible meaning given to the language of the Legislature, "except as otherwise specially provided." There is no other provision to be found on the statute books which excepts any city or county from the jurisdiction co-extensive with the county vested in justices of the peace.

It will be observed that while the Legislature seeks to amend Section 10225, it follows almost exactly the language of Section 10225 as it appeared before its amendment. The only change I could discover is that after the word "freeholder" the word "resident" is omitted; and there is no comma after the word "section." Otherwise I note no difference.

A study of Section 10224 and Section 10225, General Code, in their entirety, as they were in the General Code after the passage of the same in 1910, indicates clearly that at the time of their passage the Legislature meant, by the use of the sentence "except as otherwise specially provided" to refer to the exception found in Section 10224 in the case of the counties of Cuyahoga and Franklin, where the justices of the peace are limited to their own townships. It is therefore a full recognition that, in the opinion of the Legislature, when it passed the amendment to Section 10225 on February 27, 1917, this exception relating to Cuyahoga and Franklin counties was deemed by the Legislature as still existing and in force. The fact that the Legislature subsequently amends the provision of a statute tends to show that such statute has not heretofore been eliminated from the law. If it should be held that the provision relating to Cuyahoga and Franklin counties and the limitation of justices of the peace to their own townships in such counties was not re-enacted because not in force on September 3, 1912, there would be no meaning or sense given to the language found in the above stated amendment to Section 10225, "except as otherwise specially provided."

It may be added that if the Legislature, on April 27, 1917, in amending Section 10225, instead of saying "when a summons is accompanied by an order to attach property the jurisdiction is co-extensive with the county, except as otherwise specially provided," concluded the same by saying "except in Cuyahoga and Franklin counties," there would be no question then but that, by the express language of the act, the justices of the peace in Cuyahoga county are limited to their own townships in attachment matters. But can there be any doubt as to what the Legislature intended by the language used, "except as otherwise spe-

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cially provided"? They clearly intended to exclude Cuyahoga and Franklin counties from the provision giving justices of the peace jurisdiction co-extensive with the county in attachment matters. Therefore the Legislature again re-enacted the provision relating to justices of the peace and their jurisdiction in Cuyahoga and Franklin counties in the act of February 27, 1917. That the Legislature had power to do it, and that such a provision meets with no objection, constitutional or otherwise, can not be doubted. *In re Hesse, supra.*

So far we have dealt with the question of interpretation of Section 1711-1, passed April 18, 1913, and with the force of the amendment to Section 10225, passed February 27, 1917. It now becomes the duty of this court to deal with another very important question, namely this: Did the Legislature, by enacting Section 1711-1, succeed in conferring the jurisdiction, powers and duties which were conferred upon justices of the peace by the laws in force September 3, 1912?

I mention this because Section 16 of Article II of the Ohio Constitution provides, among other things, that "no law shall be revived or amended unless the new act contains the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed."

In the case of *State, ex rel, v. O'Brien*, 95 O. S., 166, the Supreme Court of Ohio passes upon the meaning of the above cited constitutional provision wherein the court holds that the provision of the Constitution requiring each new act to contain the entire act as revived is mandatory, and not directory; and that a violation of same renders the law of no effect whatsoever.

If it is held that since the office of justice of the peace ceased to be a constitutional office when the amendment to the Constitution became effective on January 1, 1913, therefore the laws relating to the powers, duties, jurisdiction, etc., of justices of the peace would be of no effect until re-enacted by the Legislature, the act of April 18, 1913, would amount merely to an attempt at revival, and not to a revival of former laws.

In the case of *State, ex rel Goodman, v. Redding*, 87 O. S., 388, the Supreme Court of Ohio held that a justice of the peace holding office January 1, 1913, is entitled to serve as such offi-

cial until the expiration of the term of office to which he has been elected; and the adoption of the amendment to the Constitution did not deprive him of that right. On page 394 the court states that the people of Ohio adopted a schedule of amendments, that schedule 20 was adopted, which provides:

“The several amendments passed and submitted by this convention when adopted at the election shall take effect on the 1st day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith shall continue in force until amended or repealed.”

Page 395: “Our attention has been directed to this language contained therein: ‘All laws then in force, not inconsistent therewith, shall continue in force until amended or repealed.’

“There are, and were on January 1, 1913, a number of sections of the General Code relating to justices of the peace.”

In brief, by the force of the above quoted section of schedule of amendments, justices of the peace may continue to hold office until the expiration of their terms.

The court does not pass upon the question as to the force of the above cited section of schedule of amendments upon existing laws, and as to whether it would be necessary for the Legislature to re-establish the office and re-enact the laws relating to the powers, duties and jurisdiction of same.

In the case of *Hockett v. Licensing Board*, 91 O. S., 176, on page 184 the following language may be quoted with profit:

“But it may be claimed that some of these sections were enacted by the Legislature prior to the constitutional amendment on the initiative and referendum, and, therefore, have no application. This is fully answered by the express provision of the Constitution saving certain statutes as found in a schedule adopted with the regularly proposed amendments to the Constitution of September 3, 1912. Such schedule reads as follows:

“The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith, shall continue in force until amended or repealed; * * *

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“So that by the express provision of the schedule all old statutes not repugnant to or inconsistent with the provisions of the new Constitution are as applicable to the constitutional amendment as those that are passed subsequently to the adoption of the constitutional amendments of 1912.”

The force of this language is to hold that Sections 5019, 5088 and 5089, laws which were passed before the date when the constitutional amendments became effective, and relating to the initiative and referendum, although such laws were enacted by the Legislature at a time when there was no provision in the Constitution of Ohio on the subject of the initiative and referendum,—that nevertheless the force of the schedule above cited is to continue the same in force. I am citing the same as bearing upon the question: If it be held that the Legislature, in adopting Section 1711-1, did so in violation of Section 16 of Article II of the Constitution, and that therefore what the Legislature did was an attempt to revive the old laws, but that it did not in fact revive them, the question then arises: Does the office of justice of the peace, and the powers, duties and jurisdiction of said office, continue in force, notwithstanding the lack of legislation on the subject, by force of Section 20 of the schedule of amendments? If that be the construction, from the language of the court in *Hockett v. Licensing Board*, *supra*, it becomes clear that, in construing what sections of the General Code continue in force, reference is had not to the old Constitution, but to the new Constitution as amended; and that therefore if justices of the peace derive their power and jurisdiction merely by force of Section 20 of the schedule of amendments, which continues in force all laws in force on January 1, 1913, the same provision is undoubtedly broad enough to include all the provisions found in the General Code which are not repugnant or inconsistent with the amendments to the Constitution. And undoubtedly if the force of said schedule and its provisions are so broad as to include laws relating to a subject not found in the old Constitution, and which were adopted before the new amendment became effective, it is sufficiently broad to continue in force even such laws as may be found of doubted constitutionality when viewed in the light of the old

constitutional provisions, if on January 1st, 1913, the same were not repugnant to or inconsistent with the new amendments which became effective on January 1st, 1913.

In the case of *State, ex rel D'Alton, Prosecuting Attorney, v. Morse*, 94 O. S., 435, the question arose as to whether a justice of the peace elected in Adams township, Lucas county, Ohio, may exercise jurisdiction in the city of Toledo, when a part of said township is attached to the city of Toledo. On page 436 the court has this to say:

"By force of the amendments to the Constitution of this state, effective January 1, 1913, the office of justice of the peace then ceased to be a constitutional office. Acting under the authority conferred upon it by Section 1, Article IV, of the Constitution, as amended in 1912, to establish courts inferior to the court of appeals, the General Assembly on April 18, 1913, enacted Section 1711-1, General Code (103 O. L., 214), which is as follows:"

The Supreme Court then proceeds to quote the provisions of that act. It holds, among other things, that the provisions of Section 1718 of the General Code (which in substance provide that if part of a township is attached to another township, a justice of the peace residing within the limits of the part attached shall execute the duties of his office in the township to which such part is attached) were in force on September 3, 1912; and that by the force of the act of April 18, 1913, which re-established the office of justice of the peace and re-enacted all the laws relating to the office in force on September 3, 1912, continued in force the above provisions of Section 1716.

Inferentially, the court holds that Section 1711-1 is a valid act. The question, however, as to whether it conflicts with Section 16 of Article II of the Constitution, which provides against revival of old laws by mere reference, was not before the court. What the court's decision would have been, if that question had been raised, is clearly indicated in the case of *State, ex rel, v. O'Brien*, 95 O. S., *supra*, where the court unhesitatingly declared an infringement upon the constitutional provision as rendering the law of no effect. It is quite probable that the Legislature merely attempted to revive those laws,

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but did not in fact revive them, since it did the same by reference and not by giving the full sections intended to be revived.

If it should be held that it was necessary for the Legislature, in order to continue the office, powers, duties and jurisdiction of justices of the peace, to re-enact the laws in force on September 3, 1912, it must do so by giving the full act intended to be revived, and not by mere reference.

If the jurisdiction of justices of the peace depends upon Section 1711-1, which was passed April 18, 1913, it is quite probable that justices, while established as legislative officers, possess no powers except such powers as are given them by express enactments of law.

On April 28, 1913, the Legislature of the state of Ohio passed an amendment to Section 13423 of the General Code defining the jurisdiction of justices of the peace in certain criminal cases. If it should be held that justices of the peace derive their powers, not by the force of Section 20 of the schedule of amendments, but by the force of the act of April 28, 1913, which is Section 1711-1, it is probable that the justices of the peace have only such criminal jurisdiction as is expressly given them in the act of April 28, 1913, 103 O. L., 539.

The amendments to Section 10225 (107 O. L., 20), would give jurisdiction in certain civil cases, including attachments, but the same must be read in connection with the section preceding it, as Section 10225 begins with the words, "except as provided in the next preceding section"; and also provides, "4. Where a summons is accompanied by a writ of attachment, in which case jurisdiction shall be co-extensive with the county, except as otherwise specially provided," meaning the exception as to Cuyahoga and Franklin counties.

It may be added that the objection against revivals by reference is that it leads to mere guesswork and speculation as to what the Legislature intended; and if by broad and liberal construction it should be held that the act of April 28, 1913, which is Section 1711-1, would have the effect of reviving all the laws which were formerly in force, a limitation as to the meaning of the phrase, "all laws in force on September 3,

1912," and an interpretation given to it, as meaning to exclude the provision relating to Cuyahoga and Franklin counties, wherein justices are limited to their own townships, would give greater strength to the objection raised against revival of laws or re-enactment of laws by mere reference. It is quite probable that the objection would be almost met if we were to construe the phrase, "laws in force on September 3, 1912," as meaning laws appearing in the General Code of Ohio and which have not been repealed by the Legislature. It would then amount to a re-codification of all the laws found in the so-called justice court code, a part of the General Code of Ohio. The less speculation we insert into the meaning of the phrase "in force on September 3, 1912," the more probable that the provision of the Constitution against revival of laws by mere reference would be less serious. It has accordingly been held that a compilation of laws into a code and a reference thereto in the act of the Legislature intending to enact the same as a whole, renders the enactment free from constitutional objections, even though the entire act or acts were not given or recited in full.

The only theory upon which the act of April 28, 1913, can be held free from the constitutional objection against revival of law by reference is to say that the Legislature meant thereby to re-enact all the laws found in the General Code which have not been repealed since their enactment in 1910.

Upon full consideration of the matter before me, I have come to the conclusion that justices of the peace of the outlying townships in the county of Cuyahoga have no jurisdiction to issue attachments against residents of Cleveland when neither the plaintiff nor defendant reside in the township for which the justice was elected; that such proceedings are null and void and without the force of law; that a judgment rendered in such cases by such justices of the peace is null and void and without the force of law.

Whether justices of the peace have any jurisdiction other than is provided in the act of April 28, 1913, giving them jurisdiction co-extensive with the county in certain criminal cases, and in civil cases as provided in the amendment to Section 10225 (107 O. L., 20), it is not necessary to decide.

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Whether it will be necessary for the Legislature to more definitely fix the duties, powers and jurisdiction of justices of the peace is merely indicated in the discussion, but not decided.

By force of the foregoing discussion, I am of the opinion that at last there has been secured to the people of the city of Cleveland a much needed home rule in the administration of justice. That under the present state of the law, residents of Cleveland need not submit to the jurisdiction of justices of the peace in attachment cases. It is to be hoped that the justices of the peace in the outlying townships, by being confined to their own townships in attachment cases, and unable to levy tribute upon the people of Cleveland, will find it unprofitable to continue their establishments in the city of Cleveland, and will be forced to lose their greatest source of emolument, and will return to the townships which elected them to their respective offices.

The prayer of the petition that the temporary restraining order be made permanent is granted. The defendants herein are restrained from further proceeding to collect said judgment. The plaintiff will be required to submit a journal entry embodying the orders of the court.

**PROOF REQUIRED TO ESTABLISH AN EXPRESS CONTRACT
TO CARE FOR DECEDENT.**

Common Pleas Court of Hamilton County.

BENJAMIN A. WAYBRIGHT V. HENRIETTA BONNELL, EXECUTRIX.

Decided, July Term, 1917.

*Contracts—Brother-In-Law of Decedent Files a Claim for Services—
Proof of Promise by Wife of Decedent that He Should be Paid for
Said Services—Sufficient to Establish an Express Contract.*

The requirement that only upon a showing of an express contract in that behalf, supported by clear and convincing evidence, can the

estate of a decedent be made liable for a claim for services rendered for him by a member of the family living in the common household, is met where the widow of the decedent testifies that she requested the claimant, her brother, to come and assist in caring for the decedent who was an imbecile, for which services he was given a promise by her that he should be paid out of the estate.

W. W. Bellew and Osborn & Hamilton, for plaintiff.

Hicks & Hicks and Edwin W. Kemper, contra.

GEOGHEGAN, J.

Motion for new trial.

In this case the court applied the doctrine of *Hinkle v. Sage*, 67 Ohio St., 256, and *Merrick v. Ditzler*, 91 Ohio St., 256, as to the degree of proof required where the action is based upon a contract to pay for services rendered the estate of a deceased person, by one living in a common household with that person, and it is principally urged as a ground for a new trial herein that the evidence offered by the plaintiff was insufficient to meet the requirements laid down in the aforesaid cases. This was argued so vehemently that the court had some apprehension that he had not laid down the rule as carefully as is required by the Supreme Court in this class of cases, and he therefore had a transcript of his charge made, and upon examination thereof, finds that the rule was laid down so explicitly and so carefully as to set aside all doubt as to a possible misapplication of the rule by the jury and this is fortified by the special finding of the jury that there was an express contract to pay for the services out of the estate of the decedent. So that the only question remaining is whether the evidence offered justified such a finding by the jury.

An examination of the case of *Hinkle v. Sage*, *supra*, discloses that the Supreme Court did not intend to lay down the rule that the only kind of contract of this character that could be sustained must be one that is supported by direct evidence. On the contrary the court in its opinion, on page 263, says:

“Although an actual contract, one capable of enforcement as such, must be clearly and unequivocally proved, it may be

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proved by either direct or indirect evidence. Express contracts which are proved by the declarations and conduct of the parties and other circumstances, all of which are explainable only upon the theory of a mutual agreement, are often called, although not with entire accuracy, implied contracts (15 Am. & Eng. Ency. Law [2d. Ed.], 1078); and this distinction will explain the ambiguity of some authorities and the apparent contrariety of others. All of the authorities, however, seem to agree that in suits for compensation for services, where a family relation is conceded or shown to exist, an actual contract must be clearly proved. Such contract may be in writing or it may rest entirely in parol, but it must nevertheless be a contract, and in our opinion it is a misnomer to denominate it an implied contract."

And in *Merrick v. Ditzler*, *supra*, the court in the second proposition of the syllabus say:

"Such contract may be in writing or it may rest entirely in parol and it may be proved by direct or indirect evidence."

There was evidence in this case that the defendant, acting as agent for her imbecile husband, the decedent herein, requested the plaintiff, who was her brother, to come up and help her take care of the decedent, for which service he was to be well paid out of the estate. If the jury believed this to be the true situation in regard to the controversy between the parties herein, and were convinced of this and it was clear to their minds that this was the situation, why then they would be justified in finding a verdict for the plaintiff as they did.

The trial of this case lasted many days. There was a great deal of evidence offered both as to the nature of the agreement between the parties hereto and as to the nature of the services performed by the plaintiff herein. The jury were carefully instructed that they must find an express contract by clear and convincing evidence. This instruction was not only given in the court's general charge, but frequently during the trial of the case the court took occasion to say both to counsel and the jury that such was the state of the law in regard to cases of this kind.

The court upon reflection is not prepared to say that the jury were not justified in finding from the evidence offered, and in the light of the language of the Supreme Court quoted above from *Hinkle v. Sage*, as to how such a contract may be proved, that there was such a contract existing between the parties and that the proof thereof was clear and convincing, and the motion for a new trial will therefore be overruled.

VERDICTS IN BASTARDY CASES.

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL MARIE CLUTTS, v. LAWRENCE DOLAN.

Decided, January Term, 1918.

Bastardy—Not a Criminal But a Civil Proceeding—Verdict May be Returned Upon Concurrence of Three-Fourths of the Jury.

A proceeding in bastardy is not a criminal, but a civil proceeding, in which the rule of a three-fourths jury verdict obtains.

*James S. Myers, J. J. Molloy and Phil J. Ryan, for the motion.
Chester R. Shook, contra.*

NIPPERT, J.

On March 1, 1918, the defendant in this case was found guilty of being the father of a bastard child, three-fourths of the jury signing the verdict of guilty.

The defendant by his counsel filed a motion for a new trial claiming that the proceeding in bastardy, being *quasi*-criminal in its nature, required the unanimous consent of twelve men before a verdict could be returned.

Attorneys for the defendant assert that under Article I, Section 5, of the Constitution of Ohio, "the right of trial by jury shall be inviolate, except in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury," and that this amendment to

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our Constitution has the effect of specifically limiting the three-fourths jury verdict to civil actions and to no other class of proceedings.

The main question at issue is, whether under our statute a proceeding in bastardy is a criminal or a civil proceeding, and the court is of opinion that this question has been decided definitely and clearly by Justice Brinkerhoff, in the case of *Carter v. Krise*, 9 Ohio St., page 405, where the court say:

"The question before us, then, depends altogether upon the inquiry, whether a proceeding in bastardy is a civil or criminal proceeding. If it is a civil proceeding, Section 310 of the code applies, and the defendant is a competent witness * * *

"It is certainly true that none of the forms and models of proceeding under our bastardy act are analogous to proceedings in criminal cases. And yet the most of the incidents to such a proceeding are such as belong to proceedings strictly civil. It is, or may be, prosecuted in the name of a private party only—the mother of the child, or the township trustees. On a bond of indemnity being given that the child shall not become a public charge, the proceeding may be compromised and discharged by the mother of the child. It is prosecuted neither by information nor indictment. It is no part of the duty of the attorney for the state to prosecute it. The defendant after conviction is entitled to all the benefit of the act for the relief of insolvent debtors; and, I suppose, it will not be claimed that at any stage of the proceeding he can be the subject of pardon by the executive.

"But, after all, this question can properly be determined only by looking into the essential nature, aim and object of the proceeding. Does it aim to punish the defendant? or is it in its nature simply a remedy to enforce the discharge of a civil and moral duty? It is clearly the latter, and that only. It is the duty of every man who becomes the father of a child to contribute to its support, and to save the public from the burden of its maintenance. This duty the statute aims to enforce. There is nothing punitive about it. *Hawes v. Cooksey and James*, 13 Ohio, 242; *Marston v. Jenness*, 11 N. H., 156."

See *Hawes v. Cooksey*, 13 Ohio, 242; *Musser v. Stewart*, 21 Ohio St., 356.

"In many of the states begetting a bastard child is made an offense and punished by indictment; but in this state it is not

so. The proceeding here is not strictly civil or criminal. It neither punishes a crime nor gives redress for a civil injury. It is simply a statutory remedy to enforce a high moral duty; and the moral duty is enforced to prevent a burden which ought to rest upon the father from falling upon the public." *Perkins v. Mobley*, 4 Ohio St., 673.

The same line of reasoning is followed in the case of *Musser v. Stewart*, 21 Ohio St., 356.

Defendant's attorneys, in referring to *Musser v. Stewart*, attempt to place bastardy in the category of strictly criminal transgressions for the reason that the court referred to the act of the putative father as "an offense against the peace and good order of society." But this court is not inclined to enlarge the word "offense" used in that connection to a crime, but holds it merely descriptive of an offense against the peace and good order of society. Only a preponderance of the evidence is necessary to prove the allegations of the mother's claim instead of proof beyond a reasonable doubt, which would be the rule were bastardy considered a criminal offense under our statute.

When this case was submitted to the jury, in the civil branch of this court, the rules applicable to the trial of civil actions were applied, and under the rulings of our Supreme Court pertaining to the offense of bastardy the court feels safe in holding that it is not a criminal proceeding, but a civil proceeding, in which the rule of a three-fourths jury verdict holds.

The motion for a new trial will be overruled and a judgment entry may be prepared.

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**VERDICT AS TO TWO DEFENDANTS IN AN ACTION
FOR INJURIES.**

Common Pleas Court of Cuyahoga County.

MARY LEHRER V. CLEVELAND RAILWAY COMPANY ET AL.

Decided, January 23, 1918.

Verdict—Not Responsive to the Issues—Jury Directed to Retire and Bring in a Proper Verdict—Motion for Judgment Against One of Two Joint Defendants, Notwithstanding Verdict, Does Not Lie, When—Notice to Parties or Counsel of Intention, After Verdict, to Further Instruct the Jury Does Not Lie, When.

1. A verdict for plaintiff against joint defendants and apportioning the damages is not in proper form or responsive to the issues, and the action of the trial court in refusing to accept such a verdict and instructing the jury to return a verdict which, if for plaintiff, would be against both of the defendants or against one and in favor of the other, the second verdict returned by the jury in accordance therewith will not be set aside because of such instruction.
2. Where in an action for negligence against two defendants the jury returns a verdict against one of the defendants and in favor of the other, a motion will not lie for judgment against said other defendant notwithstanding the verdict.
3. In an action for negligence brought jointly against two defendants, where the jury has returned a verdict apportioning damages between the defendants, notice to the parties or counsel that the court refuses to receive the verdict and intends to instruct the jury to return a verdict in which the damages are not apportioned.

Payer, Winch & Rogers, for plaintiff.

May P. Goodman, for defendant *Rosenstein*.

Squire, Sanders & Dempsey, for defendant, *Cleveland Railway Co.*

FORAN, J.

Heard on motion for new trial.

This is an action for personal injury, the defendants being sued jointly. The plaintiff, returning from a hospital, was being conveyed in an invalid carriage owned and operated by the

defendant, Daniel H. Rosenstein, easterly on Linwood avenue in the city of Cleveland and while being so conveyed the invalid carriage collided with one of the defendant railway company's cars going southerly on East 66th street at the intersection where East 66th street crosses Linwood avenue.

As each of the defendants owed the plaintiff a common duty to exercise ordinary care in crossing through this intersection, the defendants were properly joined as joint tortfeasors.

The jury returned the following verdict:

"We, the jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned jurors, being not less than three-fourths of the whole number thereof, do find for the plaintiff and assess her damages at \$8,141.75 against the defendant, Daniel H. Rosenstein, and we further find for the defendant, The Cleveland Railway Company, to be assessed 18 per cent. of the above amount."

Whereupon the court further instructed the jury as follows:

"Gentlemen, this verdict can not be received, for the reason that you have no right to apportion the damages between the defendants. I have already instructed you that the plaintiff could sue both defendants jointly and if you find both liable, then your verdict should be in favor of the plaintiff and against both defendants, as the plaintiff has a right to collect the whole of whatever damages you award from both or from either of the defendants if both are liable. You may return a verdict, as I have already instructed you, against both defendants or in favor of both defendants or against one of the defendants and for the other defendant. If you find, under the instructions already given you, that both of the defendants are liable, you must so say by your verdict. However, if you find one of the defendants liable and the other not liable, you may then find against the defendant you find to be liable, and in favor of the other defendant. Whatever you find against both of the defendants, that is, if you find both of them are liable, under the instructions of the court, you can not apportion the damages between them, but must find them liable jointly. You may return to your jury room and deliberate further and return a verdict in conformity to these instructions and the general instructions already given to you at the close of the argument of counsel."

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The jury retired and after further deliberation, returned the following verdict:

"We, the jury in this case, being duly impaneled and sworn, upon the concurrence of the undersigned jurors, being not less than three-fourths of the whole number thereof, do find for the plaintiff and assess her damages at \$8,141.75 against the defendant, D. H. Rosenstein; and we further find for the defendant, the Cleveland Railway Company."

Both verdicts were signed by all of the jurors.

The defendant, Rosenstein, has filed a motion for a new trial, now, assigning several reasons why the motion should be granted, among which are "That the court erred in refusing to accept the verdict as rendered by the jury and signed by the jury and returned by them in open court and entering judgment thereon. That the court erred in instructing the jury in the absence of counsel for this defendant and without notifying this defendant after the jury had returned its verdict herein."

Plaintiff has filed two motions, one for a new trial in which several grounds are alleged why the motion should be granted, and also a motion "To enter judgment in the sum of \$8,141.75 against said defendants, the Cleveland Railway Company and Daniel H. Rosenstein, in accordance with the verdict of the jury as returned herein."

In the motion for a new trial filed by the plaintiff, it is alleged that the verdict is contrary to the evidence and should have been in favor of the plaintiff and against the railway company.

The testimony of the plaintiff as to the negligence of the defendant railway company, at the time the plaintiff rested her case, was sufficient to submit the question of the defendant's negligence to the jury, yet the testimony of the railway company strongly tended to prove that it was not negligent in the premises and this evidence, as disclosed by the record, was clearly of sufficient probative value and force to enable any intelligent jury to draw a rational conclusion therefrom in support of the railway company's contention that it was not negligent, and this being true, the verdict in favor of the railway

company can not be disturbed, as the court can not say that this verdict was manifestly or clearly against the weight of the evidence, the rule being that where the evidence is of such a character that different minds may come to a different conclusion, the verdict will not be disturbed. Or, in other words, the trial court will not disturb a verdict where there is substantial and conflicting evidence before the jury, as the jury is to say which party is to be believed. Or it may be said that where the facts are such that a reasonable man might have come to the conclusion at which the jury arrives, a verdict will not be disturbed. Hence the motion to enter judgment for the plaintiff against the defendant railway company, notwithstanding the verdict, as well as the motion of the plaintiff and the defendant Rosenstein that the verdict in favor of the railway company is against the weight of the evidence, will be overruled.

We find no error in the other grounds alleged in either motion for a new trial; nor do we find that the grounds raised by various allegations in these motions are of sufficient force to justify any extended observations by the court.

There remains then the single question, did the court err in instructing the jury, after the verdict had been returned, as it did, and should the first verdict stand as the verdict of the jury?

The rule is well settled and undoubtedly is, that where damage is caused by the joint or concurrent wrongful acts of two or more persons, they may be prosecuted therefor jointly or severally. This doctrine is supported by numerous authorities in this state, and is so well settled that it is hardly necessary to refer to these authorities at length. See *Transfer Company v. Kelly*, 36 Ohio St., 86; *Pennsylvania Oil Co. v. Snyder*, 55 Ohio St., 342.

The question of the joint negligence of these two defendants was squarely raised in the petition; and as has already been said, the accident having occurred at an intersection of two thoroughfares, upon one of which the defendant, railway company, operated a double track system, and upon the other thoroughfare the defendant Rosenstein was driving and operat-

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ing an invalid carriage in which the plaintiff, an invalid, was riding upon a couch, therefore both defendants owed to the plaintiff the common duty to exercise ordinary care in passing through this intersection. And if the defendant Rosenstein was a common carrier, he owed to her a higher degree of care. The plaintiff was entitled to a joint verdict against both defendants if the jury found both were liable, although she might, upon execution, collect her judgment, or make it, against either or both of them.

Counsel for the defendant Rosenstein cites several authorities in support of his contention. First, the case of *Claiborne v. Tanner*, 18 Tex., 68, in which it is held in the syllabus that—

“Where a jury has intervened, and all the issues have been submitted to their decision, their verdict must constitute the basis of a judgment. The court can not look to the evidence on which the verdict was found, in order to determine what judgment to render, but must look alone to the verdict.”

With the doctrine that the court can not look to the evidence on which the verdict was found, we are in full accord. There is no doubt as to this proposition. But with the doctrine that the court “must look alone to the verdict,” we are constrained to say that that is not the rule or the law in the state of Ohio. It perhaps was the rule or the law while the rules of common law relating to juries and verdicts prevailed exclusively in this state.

The case of *Lloyd v. Brinck*, 35 Tex., 1, is not in point. In that case it was held in the syllabus that—

“When a jury renders a verdict in proper form, and responsive to the issues presented by the pleadings and submitted to them by the court, no discretionary power is vested in the court to set that verdict aside upon its own motion, notwithstanding the verdict may be against the weight of the evidence, or in disregard of the instructions of the court.”

The verdict now under consideration can not be said to be either in proper form or responsive to the issues presented by the pleadings. In this case the court below received the verdict,

but immediately, of its own motion, set it aside and granted a new trial. It will be conceded the court had no power to do this, either under common law rules or under code statutes. Both these cases were decided nearly 50 years ago; the first as early as 1858.

State v. Beall, 48 Neb., 817, is also cited. This was an action for money, in which the defendant filed a counter-claim. The jury in its verdict say: "That there is nothing due either plaintiff or defendant, and the said plaintiff and defendant are entitled to bear proportionately the costs of this action." This verdict the court refused to receive, and refused to send the jury back to correct the verdict and summarily discharged the jury. The action in mandamus was brought on relation of the state, asking for an order requiring the clerk to enter the verdict on the record of the court. This the court refused to grant. The Supreme Court, page 819, say that—

"Although the subject is not wholly free from doubt, the inference we draw from the record is that the verdict was by the respondent held to be insufficient in form and in substance to sustain a judgment for either party; but in that conclusion of the learned district judge we are unable to concur. The rule appears to be that a verdict which responds to all of the issues submitted should not be rejected on account of immaterial findings or recommendations superadded by the jury. In the verdict here set out there is a distinct and explicit finding with respect to the cause of action alleged by each party, and the attempted apportionment of the costs may be rejected as surplusage."

It will be noted here that the court held that where a verdict is returned which is sufficient in form and responsive to the issues made by the pleadings, it is the duty of the court to receive and enter it of record. It can not be said that in the case at bar the first verdict is sufficient in form or that it is responsive to the issues made by the pleadings. The rule here laid down is in conformity with *Hancock v. Buckley*, 18 Mo. App., 459. In this case, being an action for money, the verdict was as follows:

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“We, the jury, find for the plaintiff 125 40-100 dollars, dividing the entire costs equally between the parties.”

Paragraph 2 of the syllabus reads as follows:

“Where the verdict of a jury finds on the issues, and also superadds something not submitted to them (as for instance, dividing the costs), the verdict is good, notwithstanding the addition of matters not in issue, which last is merely void and will be disregarded as surplusage.”

To the same effect is the doctrine in *State v. Knight*, 46 Mo., 83.

Under favor of the doctrine in these cases, it must be held that the first verdict returned in the case at bar was a verdict for the plaintiff against the defendant, D. H. Rosenstein, and that the superadded portions of the verdict undertaking to assess 18 per cent of the amount against the defendant railway company, will have to be treated as mere surplusage. In the first verdict the jury say:

“We, * * * do find for the plaintiff and assess her damages at \$8,141.75 against the defendant D. H. Rosenstein, and we further find for the defendant, the Cleveland Railway Company, to be assessed 18 per cent. of the above amount.”

There is a clear intendment to find against the defendant D. H. Rosenstein, and the word “We further find for the defendant, the Cleveland Railway Company,” if the word “company” was followed by a period, would make a complete verdict in favor of the plaintiff against the defendant Rosenstein. But even taking the language of the verdict as ending with the word “Rosenstein,” it may be fairly said that the verdict is complete, and that the balance or the superadded language is mere surplusage and should be stricken out.

The case of *Fries v. Mack*, 33 Ohio St., 52, is also cited as an authority by both the plaintiff and the defendant Rosenstein. This is an action for money, brought in the Superior Court of Cincinnati, Ohio, the action being predicated upon a transcript of a judgment purporting to have been rendered in the state

of Kansas. The defendant, in his second defense, among other things, alleged that the cause of action set forth in the plaintiff's petition, for which relief is demanded, did not accrue within ten years prior to the commencement of the action, and he therefore asks to be dismissed with his costs. The plaintiff demurred to this second defense, on the ground that the same was not sufficient in law, and the court sustained the demurrer, permitting the issue to be tried as made by the first defense, which was that the judgment sued upon by the plaintiff had been assigned to him, and a denial that the plaintiff had any interest in said judgment. The jury returned the following verdict:

"We the jury do find for the plaintiff the amount \$7,000.00 and interest from the date of maturity of the seven notes of \$1,000.00 each, given February 2, 1860, up to March 2, 1874."

It will be here seen that the verdict was in no respect responsive to the issues made in the pleadings; and the court say, in the third paragraph of the syllabus:

"In an action for recovery of money, if the verdict finds for the plaintiff but its language is such that, when read in connection with the record, the amount assessed for the plaintiff can not be ascertained without reference to the evidence offered on the trial, no judgment can properly be entered on such uncertain verdict."

This is undoubtedly good law, but I can not understand how it applies to the case now before the court.

In the opinion the Supreme Court, quoting the maxim, "*Id certum est, quod certum redi potest*," say on page 60:

"A verdict in favor of the plaintiff for the amount of the note in suit, with interest from its maturity, would be certain because it could be made certain in amount by any competent accountant."

But further along in the opinion on the same page the court say:

"But the action was not brought upon promissory notes, nor were any such notes referred to in the pleadings, and the

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verdict neither gives copies of them nor states the times at which they were respectively payable."

In other words, the verdict was not responsive to the issues made in the pleadings.

The trial court entered judgment upon the verdict of the jury. This the Supreme Court said was error, and that it was not within the province of the court to identify the notes referred to by the jury or ascertain the times when they severally matured by reference to the evidence offered on the trial. The court further say, page 61:

"The facts found by the court (trial court) form no part of the record, and were found only from the memory or minutes of the judge who tried the case. Without a knowledge of these facts, no one could state from the verdict, considered *per se*, or in connection with the record, from what time the jury intended the computation of interest to be made.

"The court found, from facts outside of the record, that the jury intended by their verdict to refer to certain notes."

This the Supreme Court held the trial court had no authority to do.

It must be borne in mind, as has been already intimated, that all of these decisions are practically predicated upon the common law doctrine or rules relating to verdicts of juries and the control over such verdicts by the trial court, or the authority of the trial court to modify or change such verdicts. These ancient, iron chested, steel ribbed rules of the common law with respect to verdicts and the duty of the courts with respect to receiving verdicts have been greatly modified in modern times. It is well known to members of the bar that formerly, or in ancient times, jurors were not permitted to separate until their verdict was returned into court; and if necessary to compel them to agree, they were sometimes deprived of the necessities of life for the time being. And it sometimes happened that a recalcitrant jury which failed to agree was packed upon an ox cart by the trial court and taken from one assize or jurisdiction to another and kept by the court until the jury did agree. But

as Hitchcock, Judge, said in *Sutliff v. Gilbert*, 8 Ohio 405, 409—
“These rigid rules have been much relaxed in the practice of this state.” In this case it appears that the jurors returned a sealed verdict, the court not being in session at the time the agreement was reached, and returned the following day when the verdict was tendered. The verdict as tendered was as follows:

“It is the opinion of the jury that the plaintiff shall recover the amount that was made out of the goods at sheriff’s sale, with interest from the date of the levy; the jury are unable to find any document among the papers delivered to them by the court or the parties whereby they can ascertain the exact sum, therefore they are compelled to give their verdict in this indifferent manner.”

The court instructed the jury, after this verdict had been tendered, to retire again and find some amount of damages against the defendants. This the defendants claim was error, and error was prosecuted to the Supreme Court, one of the grounds of error being that the jury should not have been permitted to separate, and that it was error prejudicial to the defendants to have permitted them to separate. This was found no ground of error by the Supreme Court. Hitchcock, J., in the opinion, page 409, says:

“When the jury return a general verdict settling the rights of the parties, and *upon which a judgment can be entered*, or where they return a special verdict, finding the facts of a case and leaving the questions of law arising upon those facts to the court, it would be improper for the court to send them out again for further consideration. If such verdict was against law or evidence, the only relief against its effects would be on a motion for a new trial. But where the jury have decided the issue between the parties, but have failed to return a complete verdict, as, for instance, where, in an action on a promissory note, they have found for the plaintiff the amount of the note with interest, but have not specified in dollars and cents that amount, they may, with propriety, be returned to their room to make the computation of interest.”

Before the adoption of the civil code in Ohio, which was adopted in March, 1853 (51 O. L., 57), and went into effect in

July of the same year, there were not in Ohio any statutory provisions relating to the reception of verdicts and the power of the court over verdicts. By Section 273 of the code, as adopted in 1853, it was provided that either party may require the jury to be polled after their names have been called by the clerk, and if one answers in the negative, the jury must be again sent out for further deliberations. And by Section 274 it was further provided that, "If, however, the verdict be defective in form only, the same may, with the assent of the jury, before their discharge, be corrected by the court." These two sections remained in force until 1880. By virtue of an act passed by the Legislature in March, 1875, a codifying commission was appointed by the Governor, which commission reported September 15, 1879, and the following Legislature adopted the report of the commission; and in the Revised Statutes of 1880 the sections of the civil code above referred to appear as modified or enlarged by the codifying commission in its report as adopted by the Legislature and were known as Sections 5189 and 5199, Revised Statutes. Section 5199, as so adopted, reads:

"If no disagreement be expressed and neither party requires the jury to be polled, or on the polling each juror answer affirmatively, the verdict is complete and the jury shall be discharged from the case. But when the verdict is defective in form only, with the assent of the jurors and before their discharge, the court may correct it."

And in Section 5189, Revised Statutes, it is provided if a juror disagree, or if when the jury is polled, a juror answer in the negative, or if the verdict is *defective in matter of substance*, the jury must be sent out again for further deliberation, and either party may require the jury to be polled, which shall be done by the clerk or court asking each juror if it is his verdict.

It will be seen that in this latter section—"If the verdict is defective in matter of substance, the jury must be sent out again for further deliberations"—an entirely new provision of law was adopted in relation to verdicts and their reception by the court and the duty of courts with respect to these verdicts in certain instances, that is, if the verdict is defective in matter of

substance. This language was subsequently modified by the codifying commission whose report was adopted by the Legislature and enacted by the 78th General Assembly on January 31, 1910. In Section 5198, Revised Statutes (Section 11456, G. C.), the language was changed to read as follows: "If the verdict in substance is defective, the jury must be sent out again for further deliberation."

We have examined all the authorities or Ohio decisions cited, as well as those not cited by counsel, and we find that Section 11458, General Code, which provides that, "If, on polling the jury, a juror answers in the negative, or if the verdict in substance is defective, the jury must be sent out again for further deliberations," has not been under consideration by the courts so as to require interpretation by authorities of the words "if the verdict in substance is defective."

The other section of the General Code has been frequently under consideration and has received frequent interpretation. Where there are clerical or grammatical errors in the verdict, or in cases where the plaintiff is entitled to interest and the jury finds for the plaintiff "with interest" from a certain date, it has been held generally that the verdict is defective in form.

It is quite evident that Section 274 of the civil code as enacted in 1853 was largely confirmatory of judicial determination or decision then existing, so far as the right of the trial court to require the jury to deliberate further when the verdict returned was defective in form. Undoubtedly the right to poll the jury, especially in criminal cases, is very ancient, and the incorporation of this right in the code or statute was merely declaratory of the common law rule and the rule based on judicial precedent. The amendment of the codifying commission relating to verdicts defective in substance, as found in the Revised Statutes of 1880, was an enlargement of these rules and intended to clarify the doctrine of previous judicial determinations.

In the case of *Sutliff v. Gilbert*, *supra*, it was said in the opinion, as has been already stated, "If such verdict was against law or evidence, the only relief against its effects would be on a motion for a new trial. But where the jury have decided the

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issue between the parties, but have failed to return a complete verdict, * * * they may with propriety be returned to their room to make the computation of interest," in cases where the interest has not been computed by the jury and added to the verdict or the amount due.

A verdict may be said to be defective in form when the language or expression used is imperfect or wanting to correctly express the real intention of the jury, and may be corrected by the jury or by the court with the consent of the jury when or in cases where it can be done without affecting the issues raised by the pleadings or presented by the evidence. A verdict is defective in substance if it is wanting in some real or essential part or element and does not correspond to the issues raised by the pleadings; and the language "defective in substance" may be said to be opposed to or opposite to form or defective in form. If, for instance, a man sues upon a promissory note upon which interest is due for one or more years, and the jury find for the plaintiff, or find that the plaintiff is entitled to recover the full amount of the face of the note, but no reference is made to the interest, the verdict is defective in substance; for if the plaintiff was entitled to recover on the note, he was entitled to the interest, and the verdict was wanting or lacking in an important essential, and therefore defective in substance.

A painting, a photograph or a drawing is indicative of the form of the thing represented, but not of its substance.

A verdict is contrary to law when it is contrary to the principles of law applicable to the facts which were submitted to the jury and which the jury were to try and determine. *Basseker v. Cramer*, 18 Ind., 45; *Candy v. Hanmore*, 76 Ind., 125. Or a verdict is against the law if it is in disobedience to the instructions of the court upon a point of law. *Declez v. Save*, 71 Cal., 552, 553. Obviously a verdict that is against the weight of the evidence is against or contrary to law. In general, a verdict may be said to be contrary to law where the party prevailing should not have recovered upon the law or the facts, or where the party failing has been materially prejudiced

by the instructions of the court or its rulings upon the admissibility or rejection of evidence. If the verdict is contrary to law, the court has no power, under the rules of the common law or by favor of judicial decision or by virtue of the code provisions, to interfere with it or direct the jury to deliberate further, as the only way to correct such defect or wrong is by granting a motion for new trial. This is well settled, and no further authorities need be cited in support of the proposition.

The distinction between a verdict defective in form or substance and a verdict contrary to law is clear and obvious. If the verdict is merely not responsive to the issues clearly raised by the pleadings, it may be defective either in form or in substance. If, in determining whether a verdict is contrary to law or defective in form or substance, recourse must be had to the record and the evidence, then it is contrary to law. *Sutliff v. Gilbert, supra*, and other authorities already cited.

In the case at bar the joint and several liability of the defendants was clearly raised by the pleadings. The first verdict returned must be said to be defective in substance, as it is wanting in an important essential, as the jury did not find in clear unmistakable language that both defendants are liable, as the issues presented by the pleadings obviously require. If it is admitted that the language used by the jury indicates an intention to find against both defendants, the verdict can not be said to be contrary to law simply because the jury had no legal authority to apportion the damages, and for the reason that it was necessary to search the record to determine the question of liability, and as the verdict is not responsive to the issues raised by the pleadings, it is therefore defective in substance; but if it can be said from the language used that the verdict is against the defendant Rosenstein alone, then the attempt of the jury to assess a portion of the damages against the defendant railway company renders it defective in substance and perhaps in form, and the latter part of the verdict can be treated as mere surplusage. It is quite evident the jury did not follow the form of verdict prepared by the clerk under the directions of the court. Suppose the jury had returned a verdict against

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one of the defendants without indicating they found in favor of the other defendant, would the verdict not be defective in substance as being incomplete and as lacking or wanting in an essential matter? If such had been the finding or verdict returned, it would not be seriously claimed that the court had no power, under Section 11456, General Code, to require, by further instruction, the jury to return a complete verdict. I can see no escape from the conclusions reached, that the verdict as returned was incomplete and defective in form and substance, and that there was no error by the court in instructing the jury as it did and in sending the jury out for further deliberation.

That the jury believed the defendant railway company not liable is fully shown and indicated by both verdicts. If the jury believed there was some negligence by the railway company, it is quite certain they believed or found the defendant Rosenstein was five and a half times more negligent in causing the plaintiff's injuries than the railway company. If this was the finding or conclusion of the jury, it is manifestly apparent that the negligence of the railway company was so attenuated as to reach the vanishing point, and so remote that it can not be said to have been a proximate cause of plaintiff's injuries. This becomes more clearly apparent by the refusal of the jury in the second verdict to find the defendant railway company liable when it understood that the whole amount of the damages could be collected from either of the defendants if both were found liable. We can not escape the conclusion that the verdict was a compromise or an effort to reach a unanimous agreement by composing some differences of opinion that evidently arose during the deliberations of the jury.

The claim of the plaintiff and the defendant Rosenstein that the court erred in not sending for counsel before it sent the jury out for further deliberations is not well taken. In ancient times, even in Ohio, a practice prevailed, when a jury required further instruction, to call counsel at the court house door in a loud voice. Of course, this was a mere matter of form, as nobody expected that counsel half a mile away would hear the call.

That a trial court can reinstruct the jury in the absence of parties or counsel in a civil case upon questions of law, is well settled. *Seagrave v. Hall*, 10 C. C., 395.

It is error for the court to reinstruct the jury, in the absence of parties or counsel, upon matters of fact, unless opportunity is given to be present. *Seagrave v. Hall, supra*; *Chambers v. Ohio Life Ins. Co.*, 1 Disn., 327.

This is indeed a matter provided for by the code. Section 11452, General Code, provides that, after the jurors retire to deliberate, if they disagree as to the testimony or desire to be further informed on the law, they may request the bailiff to direct them to the court, "which shall give the opinion sought on matters of law, and also, in the presence of or after notice to the parties or their counsel, may state its recollection of the testimony upon a disputed point."

In the case at bar the court, when he reinstructed the jury, did not give the jury any instructions as to matters of fact. The only new instruction given was that the jury had no right to apportion the damages if they found against both defendants. The balance of the instruction was simply a reiteration of the former instructions of the court.

In *Powers v. Boehme*, 17 C.C.(N.S.), 37 (38 O. C. C., 489), our own circuit court said in the syllabus:

"It is not prejudicial error to recall the jury and emphasize certain portions of the charge previously given if the circumstances of the trial warrant it."

The circumstances under which the jury was recalled in this case are not shown, or were not shown by the record; but we think it is well settled, so well settled that no authorities need be cited, that where the court reinstructs the jury for any reason, upon a question of law, it is not error if the parties or counsel are not called or are not present.

In the case of *Campbell v. Beckett*, 8 Ohio St., 211, it is held in the syllabus:

"It is error for a judge, during a recess of his court, in the absence of the party and his counsel, without notice to them, to

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give instructions to the jury to whom the case has been submitted.”

This case was decided during the December term, 1857, when the civil code of 1853 was in effect. The provisions of this code, Section 266, provided, in paragraph five of that section, that “when the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court.”

By paragraph seven of this section it is provided, “The court may again charge the jury after the argument is concluded.”

It will be here seen that under the practice of the civil code as it existed at that time, either party had the right to demand instructions on points of law, but it was left optional with the court whether any further instructions should be given after the argument had closed or was concluded.

In the case just cited, *Campbell v. Beckett*, *supra*, it appears that “no instruction being asked by either party, the court ordered the jury to take the case and return such verdict as justice required, without giving any instructions. “Afterward the jury requested that the court explain to them *a point of law*, which the court did in the presence of counsel. Next morning, during a recess of the court, the jury again requested further instructions, which were given in the absence of counsel or the parties.

The practice and the law as it then stood is not the practice or the law at present, nor has it been the practice or the law for many years. The section of the civil code just quoted was amended—whether by the Legislature or by the codifying commission is immaterial—and the seventh paragraph of Section 11447, General Code, now provides:

“The court, after argument is concluded, before proceeding with other business, *shall charge the jury*. Any charge shall be reduced to writing by the court if either party, before argument to the jury is commenced, request it.”

When the case of *Campbell v. Beckett*, *supra*, was decided, Section 270 of the original code was then in effect and read as follows:

"After the jury have retired for deliberations, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given, and the court may give its recollection as to the testimony upon the point in dispute, in the presence of or after notice to the parties or their counsel."

This section now appears in the General Code as Section 11452, and reads as follows:

"After the jurors retire to deliberate, if they disagree as to the testimony or desire to be further informed on the law of the case, they may request the officer in charge to conduct them to the court, which shall give the information sought upon matters of law, and also, in the presence of or after notice to the parties or their counsel, may state its recollection of the testimony upon a disputed point."

It will be here noticed that the section of the code now in effect differs very materially from the section of the code which was in effect when *Campbell v. Beckett*, *supra*, was decided. Under the section of the General Code as it now stands (Section 11452), it is clear that the court may give or shall give any information sought by the jury upon matters of law. After the word "law" then appears these words: "And also, in the presence of or after notice to the parties or their counsel, may state its recollection of the testimony upon a disputed point." In other words, this section of the code provides that the court may give the jury any information they seek upon matters of law in the absence of parties or their counsel. But if the court desires to state its recollection of the testimony upon a disputed point, then it is necessary to give notice to the parties or their counsel, unless counsel are present at the time; and this has been the holding under this section by all the courts since its adoption; as, for instance, it was held in the case of *Emery v. Whitaker*, 2 C. S. C., 36, decided in March, 1869, after the rule of practice had changed, that—

"When the jury come out and ask instructions of the court, it is not error to give them further instructions of law, correct

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in themselves, in the absence of counsel, though no call of counsel at the court house door is made.”

We think it clear that no error was committed in the respect claimed by counsel.

The motions of the defendant Rosenstein and the plaintiff are overruled so far as the defendant railway company is concerned.

The question raised by counsel for the defendant Rosenstein in the motion for new trial, that the verdict is excessive, is reserved for further consideration.

PROSECUTION FOR PERJURY IN VERIFYING A PETITION.

Common Pleas Court of Franklin County.

STATE OF OHIO V. EDNA FAIRBAULT.

Decided, April Term, 1917.

Criminal Law—Verification of Pleading on Belief—Basis for a Prosecution for Perjury—Where the Facts Stated Are Known by the Affiant to be False.

In determining responsibility for making a false affidavit to a pleading, the fact that the form of the affidavit is on belief becomes immaterial, where it is apparent that the party charged must have known the truth or falsity of the facts stated.

Robert P. Duncan, Prosecuting Attorney, for the state.
M. B. Earnhart, contra.

KINKEAD, J.

The indictment charges defendant with perjury in swearing to the verification of a certain petition, filed in the case of Edna Fairbault, plaintiff, against the Columbus, Urbana & Western Railway Company, before a notary public.

It is charged that she falsely swore to the facts alleged in the petition filed in that case. She alleged that she was the owner of two diamond rings of the value of \$185, and that by

reason of the negligence of the defendant railway the rings were knocked from her fingers and the same were lost.

The indictment charges that the facts alleged are false in that the rings had been previously found and restored to her.

Judicial notice may be taken of common rules of practice, such as that all verification to pleadings of fact are made upon belief pursuant to statute.

Section 11331 provides that every pleading of fact must be verified by the affidavit of the party, and Section 11354 makes it sufficient if it is stated that the affiant believes the facts stated to be true. It is to be assumed that the affidavit in this case was made upon belief in their truth.

The statute defining perjury provides that one who either orally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood as to a material matter in a proceeding before a court, is guilty of perjury. Section 12842.

The charge of the indictment is that defendant in writing willfully and corruptly stated as a basis for recovery of money by action that defendant lost the rings, when as matter of fact they were not lost.

The gist of the crime is in willfully and corruptly stating a falsehood, on oath lawfully administered.

Where it is apparent, as it is in this case, that the party charged must have known the truth or falsity of the facts stated, the form of the verification on belief becomes immaterial in deciding upon the responsibility for making a false affidavit.

The purpose of Section 11354 was to enable a party who may learn of facts material to his cause, upon information obtained in such manner as to cause a belief in their truth, to state them in his pleading.

To state facts thus obtained in good faith, honestly believing in their truth upon apparently reliable sources, can not be willfully and corruptly stating them.

If it appears—as it does in this case—whether a person actually lost property—that he or she must know whether the same was lost or not—it becomes quite immaterial whether the pleading is made in the customary form of belief in their truth.

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Section 11359 providing that a pleading, verified as provided by statute, shall not be used against a party in a criminal prosecution as proof of a fact admitted or alleged in the pleading does not militate against the indictment. Nor may it be material on trial, as the state may prove the facts in some other way than by the pleading.

The facts of making the affidavit to the pleading may be proven by evidence independently of the petition, so may all the other facts be shown.

The demurrer to the indictment is overruled.

**CONSTRUCTION OF THE WORDS "HEIRS" AS USED
IN A WILL.**

Common Pleas Court of Clark County.

FOREST D. MILLS V. EMERY MILLS ET AL.*

Decided, 1917.

Wills—Flexible Meaning of the Word "Heirs"—Technical Meaning Will Not be Adhered to Where Manifestly Contrary to the Intention of the Testator—Resort Had to Whole Contents of the Will in Determining Intention—Property Held Not to Pass to Widow of Life Tenant, But to Revert to His Brothers and Sisters and Their Representatives.

1. Where the word "heirs" appears in a will, it is to be construed in its strict, technical sense, unless it clearly, manifestly and very certainly appears that the testator used it in a different sense.
2. While the presumption is that the testator had knowledge of the meaning of the technical terms used, if from a consideration of the whole context of the will, it is ascertained that he did not, as a matter of fact, speak a technical language, but used the words in a different sense, the words must be given the meaning he intended.
3. Where the testator used the following language, "I give and bequeath to my son John during his natural life and to his heirs,"

*Affirmed by the Court of Appeals, March 17, 1917, in an unreported opinion; judgment of the Court of Appeals affirmed by the Supreme Court January 15, 1918.

certain real estate, the entire will is to be considered to determine in what sense the word was used, and if it is manifest that he intended to use it not in its technical sense, but to designate "children," this use of the word will be applied to the item in question.

4. In such a case it will be held that the son takes a life estate only, with the remainder to his children or issue, and not to his heirs generally; and he having died without issue, the devise in remainder failed, and the estate reverted to the heirs of the testator, and the widow of the son did not take the fee as his heir.
5. The reversion in fee descended to and vested in the heirs of the testator at his death, subject, however, to divest in the event that the devisee for life should die leaving children surviving.

W. M. Rockel, and *W. Y. Mahar*, for plaintiff.

McGrew & Laybourne, for Margaret Anderson et al.

Zimmerman & Zimmerman and *C. S. Olinger*, for Clara J. Mills.

GEIGER, J.

This is an action in which the plaintiff seeks partition of certain real estate described in the petition. He alleges that he is seized in fee simple as heir at law of John Mills, deceased, of the undivided one-eighteenth part of the real estate, and that certain of the defendants are seized in fee simple of certain other proportions of said real estate.

To this petition an answer is filed by Clara J. Mills in which she denies that the plaintiff, or any of her co-defendants, are entitled to any part of the real estate as the heirs of John Mills, and she claims to be entitled in fee simple to the entire real estate as the widow and heir at law of John Mills, under the third item of the will of Thomas Mills.

After answer was filed by Clara J. Mills she deceased, and James E. and Iva Cultice claim the entire estate under the will of Clara J. Mills.

The issues thus raised call for an examination of the will of Thomas Mills, who died in 1866, leaving surviving him several children and grandchildren, among whom was his son John Mills, who died in 1915, childless, leaving Clara J. Mills his widow.

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The pertinent portions of the will of Thomas Mills may be briefly stated as follows:

By Item 1 of said will he bequeathed to his son James during his natural life, and to his heirs at his death, certain real estate, "immediately north of the lands hereafter devised to Sibbia's heirs."

By Item 2 he bequeathed to his daughter Nancy during her natural life, and to her heirs, certain real estate. Item 3 disposes of the land now sought to be partitioned in this case, as follows:

"I give and bequeath to my son John during his natural life, and to his heirs, the old home farm in Section 23 and 29, T.5, R. 8, and all my personal property not otherwise disposed of."

By Item 4 he bequeathes to his daughter Sibbia's heirs the balance of certain real estate.

By Item 9 he bequeathes his lands in Kansas equally, "to my son James and daughter Sibbia's heirs, Hannah and Letty."

The decedent executed a codicil on the 26th of October, 1865, reciting the fact that two of his children, Nancy and Letty, both receiving legacies in his will, have deceased, "and other changes in my family seem to make this codicil and amendment to my before-mentioned will necessary."

Item 3 of said codicil is as follows:

"That the other four-fifths of said farm be divided equally between my children, James, Hannah, Sibbia and John, or their heirs, having by deed dated October 6, 1865, given to my daughter Letty's heirs, William James, Mary Lavinia, John Henry and Martha Jane Inkow, my Kansas lands in lieu of their interest in this last mentioned farm."

At the time of the making of this will and codicil John, mentioned in Item 3, was unmarried, but subsequently married Clara J. Mills, who survived him.

The question is whether under this will Clara J. Mills, the widow of John Mills, inherits said real estate as heir, or whether the words, "to his heirs," in Item 3 of the will, were used by the testator to designate the children of John. If the word

"heirs" in Item 3 is to be given its technical meaning, then Clara J. Mills was the heir of John Mills, and took the real estate upon his death.

If by the word "heirs," the testator meant the children of John, he having died childless, the estate passed upon his death to the children of his brothers and sisters, the grandchildren of the original testator, Thomas Mills.

In the construction of a will it is well settled that the intention of the testator as gathered from the whole will must control. It is also an established rule that words in a will are to be construed according to their ordinary and legal significance, unless it is manifest from the context, or other provisions in the will, that the testator has used them in a different sense, and unless such different sense is clearly apparent.

Words of inheritance used to vest the estate, standing alone, are to receive that construction and interpretation which a long series of decisions has attached to them unless it is very certain that they were used in a different sense, and courts should never depart from the established technical meaning of the word "heir" in any case where from a consideration of all the circumstances a doubt arises as to what the testator meant. *Carter v. Reddish*, 32 O. S., 1; *Collins v. Collins*, 40 O. S., 353; *St. Marks Lodge v. Darrow*, 16 O. D.(N.P.), 120; *Halley v. Hengstler*, 3 C.C.(N.S.), 161; *McDaniel v. Hays*, 6 N.P.(N.S.), 435; *King v. Beck*, 15 O., 559.

It must be concluded that the word "heirs" is to be used in its strict technical sense, unless it clearly, manifestly and very certainly appears that the testator used it in a different sense.

"But the term 'heirs' when used in a will is flexible, and should be so construed as to give effect to the manifest intention of the testator as ascertained by a due consideration of all the provisions of the will." *Jones v. Lloyd*, 33 O. S., 572.

Judge Sahuck, in delivering the opinion in the case of *Durfee v. McNeil*, 58 O. S., 238, says, in speaking of the word "heirs": that it would be unprofitable to analyze or even to cite the numerous cases in which the term has been held to

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have been used in its general sense to designate any one capable of inheriting, or in its limited sense to designate children, as the testator's intention may appear from the scheme, and all the provisions of his will.

Without citing further cases at this time, we will consider the will and codicil to determine, if possible, the sense in which the testator used the word "heirs," where it appears in said instruments, as set out above.

An examination of the will and codicil will disclose first, that the testator, in Items 1, 2 and 3 devised real estate to each of his three children therein named, during his natural life, and to his heirs.

It next appears that Sibbia's children are spoken of as her "heirs," Sibbia being dead at the time, it is true this was the correct designation of her children. Sibbia's "heirs" are spoken of in Items 4 and 9 of the will.

By the codicil it appears that the death of his two daughters, Nancy and Letty, and "other changes in my family," called for the making of the codicil. This indicates that the mind of the testator was expressly and properly directed to his "family."

In Item 3 of the codicil the bequest is made to his children, James, Hannah, Sibbia and John, or their heirs. Sibbia being dead, the testator appears to have intended to designate her children by the term, "or her heirs," as he had done in other portions of the will.

Further in said item he enumerates by name Letty's heirs, who were, as a matter of fact, Letty's children.

From the above recital of the will are we able to determine the intention of the testator in the use of the word "heirs"? It is manifest that in certain portions of the will he used it to designate the children of his deceased children.

The case of *Bunnell v. Evans*, 26 O. S., 409, is an interesting case, and a strong one on behalf of plaintiff. It calls attention to the fact that as far as the real estate devised by Item 3 to John for life is concerned, there can be no heirs of John in the technical sense of the word, as he had only a life estate that would

terminate at his death. Whoever takes the estate under this or like items of the will, takes it not as heir of the life tenant, but as devisee under the will.

Certain of the defendants claim that they are clearly entitled to this estate under a decision of the circuit court in the case of *Miller v. Miller*, 9 C.C.(N.S.), 242, affirmed by the Supreme Court.

In this case it is held, in a provision of a will similar to the one under examination, that upon the death of the son the wife takes as heir, where there is nothing in the will tending to show that the testator used the words, "lawful heirs," in a sense different from their strict technical import.

It will be observed in the will there under examination, that the testator in the second item devised to his son Howard, and at his death to his children, and in the third item devises to his son Richard, and at his death to his children, and by the sixth item he devises to his son Peter during his life, and at his death to his "lawful heirs."

This difference in the several bequests might well indicate that the testator intended to make a difference in the final disposition of the estate after the termination of the several life estates. The court, in this case, says:

"If, however, there is nothing in the will or the surrounding circumstances showing that the testator used the words in a different sense from their strict technical significance, then that significance must be given them."

But it is apparent that the testator used the word "heirs" in its technical sense, and not as meaning children.

The case of *Reif v. Ulmer*, 9 N.P.(N.S.), 234, holds that in the case under consideration the words "lawful heirs" are used in their strict and technical sense, but both the common pleas court, and the circuit court in affirming the judgment of the common pleas court, pointed out a number of things in the will that indicated that the testator intended to use the words in the technical sense, and not as meaning children.

In the case of *Weston v. Weston*, 38 O. S., 473, the provision of the will is, "in case my said child should die without issue

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her surviving, then all the property so devised shall pass to and vest in my heirs at law." The testator died leaving surviving the child, and also his wife, a brother and two sisters, who survived the child, who died without issue.

It was held that upon the death of the child the widow of the testator succeeded to the property as heir at law of the testator.

Judge McIlvaine, delivering the opinion of the court, stated that the report of the case was made because of the suggestion that the decision was not in harmony with *Jones v. Lloyd*, *supra*.

The first difference between the case of *Weston v. Weston* and the case at bar, is that the widow, who inherited as the heir at law of the testator, is the widow of the testator, and not the widow of the testator's child, as in the case at bar.

The court goes to some length in pointing out how the estate would have passed had the testator died intestate and without children, and concludes that it was improbable, having a presumed knowledge of the laws of descent and distribution, he had intended to designate his brothers and sisters as "legal heirs," to the exclusion of his wife.

The court concurs in the principle laid down in the case of *Jones v. Lloyd*, but says this principle does not conflict with the well established rule of construction, that technical words used in a will should have their strict technical meaning, unless it appears that the testator used them in some other or secondary way.

The conclusion in reference to the case of *Weston v. Weston* is that it falls within the well defined principle laid down by the courts, that the intention of the testator as disclosed by the entire will should control, and it does not seem to the court that the circumstances surrounding the testator and the terms of the will itself were such as to make this case controlling in the case at bar.

A case cited with justifiable assurance by counsel is that of *Smith et al v. Hunter, Trustee*, 86 O. S., 106, where it is held that the rule that in the interpretation of a will the testator must have been presumed to have meant what he said, required

that the devise of a remainder to the heirs at law of a beneficiary for life be regarded as including an adopted child of the beneficiary, although there was not, when the will was executed, any statute for the adoption of children.

While it is true, as announced in this case, that the testator must be presumed to have meant what he said, it is equally true that in order to determine what he really said we must ascertain the language in which he spoke. The presumption is that he had knowledge of the meaning of the technical terms, but if from the whole context of the will we ascertain that he did not, as a matter of fact, speak a technical language but used the words in a different sense, we must give to the words used the meaning he intended.

The case nearest on all fours to the case at bar is probably the case of *Stewart v. Powers*, 9 C. C., 143.

In that case the testator devised the use of a farm to a married daughter for her life, with remainder in fee to her heirs. The daughter died leaving her husband, but without living issue. In other items of the will, the testator bounded other lands to other of his children by lands described as belonging to the "heirs" of certain named persons. The husband of the daughter was not named or referred to in the will.

The court holds it was proper to show that the testator used the word "heirs" in the sense of children by showing that where used in describing the bounds of the property it was intended thereby to designate certain persons known to be the children of the testator's neighbor.

It was held that under such circumstances it is to be presumed that the testator used the word "heirs" in the sense of children, and intended to exclude the son-in-law, and that the devise of the remainder having failed, the estate passed to the heirs of the testator.

In the case of *Bunnell v. Evans*, 26 O. S., 409, the court holds that:

"Where a testator made a devise to his son John, through his natural life, and then to his heirs, and in another part of the will used the word 'heirs' in the sense of children, the son took

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a life estate only, with remainder to his children, and not to his heirs generally, and that upon his death without issue the devise in remainder failed and the estate reverted to the heirs of the testator."

An examination of the will, in the opinion of the court, discloses the fact that the testator, Thomas Mills, in using the word "heirs," as the same appears in Item 3, used it, not in its strict technical sense, but to designate the children of his son John, and therefore upon the death of his son John without children, the estate does not pass to John's widow, but the devise in remainder fails, and the estate passes to the children of the brothers and sisters of John, who are of the blood of the testator.

The court therefore holds that Clara J. Mills did not inherit under Item 3 of the will.

The question is now presented as to the time at which the fee in the estate vested—whether at the death of Thomas or John—this question controlling the division of the estate.

If the estate vested at the death of Thomas it would be divided into four portions, and the several nieces and nephews of John would take the portions belonging to their respective parents.

If the estate vested at the death of John, it would be divided into fourteen portions, and each one of the grandchildren of Thomas then living would take an equal portion.

The court is of the opinion that the reversion in fee descended to and vested in the heirs of the testator living at his death, subject to divest in the event that the devisee for life should die leaving children.

See *Gilpin v. Williams*, 25 O. S., 283; *Ewers v. Follin*, 9 O. S., 327; *Dutoit v. Doyle*, 16 O. S., 400.

It being so, distribution of the estate would be controlled by Section 8580, General Code, *et seq.*

EXECUTION AGAINST PARTNERSHIP ASSETS.

Superior Court of Cincinnati.

HENRY F. LUCKE, JR., v. WM. B. BURK.

Decided, March, 1918.

Partnership—Agreement to Divide Assets Between the Partners—No Provision Made for Payment of Partnership Debts—Assets Awarded to Insolvent Partner—Exempt from Execution in Lieu of Homestead.

1. Where partnership assets are seized in execution by partnership creditors the members of the firm are not entitled to statutory exemptions, in lieu of homestead claims.
2. But where the members of a partnership acting in good faith dissolve the firm and by written contract distribute the assets between themselves, making no mention of firm debts, they are no longer partners and the assets become the separate estate of each former partner. Under such circumstances each former partner may be allowed his statutory exemptions out of said former firm assets even as against firm creditors. *Mortley v. Flanagan*, 38 O. S., 401, followed and approved; *Gaylord Son & Co. v. Imhoff & Co.*, 26 O. S., 317, and *Aultman, Miller & Co. et al v. Wilson, Assignee*, 55 O. S., 138, distinguished.
3. Where partners have by agreement dissolved their relations toward each other as such, and have divided the firm assets between themselves, equity will not intervene and order an accounting and appoint a receiver for said former firm assets at the request of one former partner in a later action against another former partner, where none of the old firm creditors are parties, for the sole purpose of creating assets with which to pay firm claims and to meet the *in solido* liability of the partners individually.

William Shepard, for plaintiff.

Nathaniel H. Maxwell, contra.

GUSWEILER, J.

This is an action by plaintiff asking for an accounting and receiver against his former partner. The plaintiff claims that he and the defendant were partners since October 27th, 1917, engaged in the laundry business in Cincinnati, Ohio; that the

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plaintiff contributed to the assets of the firm all its capital and the defendant contributed one horse, one set of harness, three wagons, two offices or laundry stations, including certain routes, etc. The plaintiff claims that there are differences existing between himself and the defendant and that the firm assets are being dissipated to the damage of firm creditors; that the firm is insolvent and that creditors are pressing the firm for payment of their claims, and that unless a receiver was appointed the plaintiff and firm creditors would suffer irreparable damages. The plaintiff then asks that the partnership be dissolved; that a receiver be appointed to take charge of the firm assets and pay the firm debts, and for an accounting against the defendant as plaintiff's partner.

The motion and affidavit of the defendant indicate that the defendant and plaintiff entered into a written contract of dissolution of their former partnership on February 12, 1918, a week prior to the filing of the petition herein; that by virtue of said contract of dissolution he and the plaintiff are no longer partners; that defendant is a married man, the head of a family dependent upon him for support, and that he claims the former partnership assets which he took as his share on dissolution as exempt from execution in lieu of his homestead.

Plaintiff contends that while the contract of dissolution is valid as to the firm assets, there being no provision therein for the payment of firm debts, it does not in law constitute a valid dissolution of the partnership.

On the hearing of the case on its merits we find that this action is solely between plaintiff and defendant, two former partners, no creditors of the firm being parties to this suit. We find that the written contract of dissolution between plaintiff and defendant under date of February 12th, 1918, one week prior to the filing of this suit, reading as follows:

“CINCINNATI, OHIO, Feb. 12, 1918.

“For value received W. B. Burk hereby sells and assigns to H. F. Lucke, Jr., all of his right, title and interest in the partnership of the Cut Rate Laundry at 1902 Colerain avenue, Cincinnati, Ohio, including all the assets of said partnership—the

Cut Rate Laundry; except as follows: one horse, harness, three wagons, two offices (Nos. 921 Elm St. and 1316 Central Ave.) and all of the work going through these two offices, including the routes for the same, in which said H. F. Lucke, Jr., hereby sells and assigns all of his right, title and interest to said W. B. Burk.

“WM. B. BURK,

“H. F. LUCKE, JR.

“Attest:

“WILLIAM SHEPARD.”

in which plaintiff and defendant agreed to distribute the firm assets although they made no mention of the disposition of the firm debts, constitutes a valid partnership dissolution. We find that by virtue of said partnership dissolution the respective firm assets taken by plaintiff and defendant have become and are now his separate property and estate. We find that the defendant is a married man, the head of a family dependent upon him for support and that defendant is entitled to set up his statutory claim in lieu of a homestead as against this plaintiff as well as against any other creditor, whether partnership creditor or individual creditor, on execution against the property given to defendant out of the firm assets under said partnership dissolution contract. In the instant case no creditors are involved, no firm property has been seized in execution by partnership creditors as occurred in *Gaylord, Son & Co. v. M. Imhoff & Co.*, 26 O. S., 117. Were this the case and the firm creditors had levied on said firm assets or an assignment had been made of the firm assets to an assignee, etc., as in *Aultman, Miller & Co. et al v. Wilson, Assignee*, 55 O. S., 138, then the partners could not in law set up a claim for exemptions against firm creditors.

We are inclined to follow *Mortley v. Flanagan*, 38 O. S., 401, a case directly in point. In the instant case the former partners having dissolved their relations as partners, and having divided the firm assets between themselves, said assets have now become the separate estate and property of each partner.

It follows therefore that plaintiff is not entitled to the relief prayed for in his petition. The receivership appointment will be set aside and plaintiff's petition dismissed.

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INVALIDITY OF EXISTING INDEMNITY CONTRACTS AGAINST DAMAGES FOR INJURIES TO EMPLOYEES.

Common Pleas Court of Franklin County.

FRANK C. THORNTON v. THOMAS J. DUFFY ET AL.

Decided, April 16, 1918.

Workmen's Compensation—Amendment of 1917 Making Existing Indemnity Insurance Void—Not Retrospective With Reference to Existing Insurance—Such Legislation Valid, Because of a Character Which Might be Reasonably Anticipated by Those so Contracting.

1. The amendment of 1917 of Section 1465-101, General Code (107 O. L., 7), of the Workmen's Compensation law, rendering void all contracts which undertake to indemnify or insure an employer against loss for the payment of compensation to workmen or their dependents, for death or injury occasioned in the course of their employment; and the amendment of said act of Section 1465-69 (107 O. L., 159), requiring as a condition to such employers of labor to qualify them to a certificate to elect to pay direct under said act, that they do not desire to insure or indemnify themselves against loss sustained by such direct payment, are provisions which are intended to and do affect and invalidate all such existing contracts of insurance made subsequent to the enactment of said original compensation law.
2. Said acts do not fall within the objection of retrospective legislation. Such contracts are made within the reasonable contemplation of such legislation and subsequent amendments thereto, enacted to conform to conditions effecting the desired purposes, and must be changed or ended, when necessary, to enable a full and complete operation of the law.
3. Said amendment of Section 1465-101, and of Section 1465-69 are not in contravention of the Constitution of the United States, or the Constitution of the state of Ohio, but are enacted in the exercise of the police power, and are within the Constitution, and made to meet the needs of existing social conditions, and as necessary to the public welfare.

Judson Harmon and *A. I. Vorys*, for plaintiff, and for defendant, *The Cleveland Stamping and Tool Co.*

Joseph McGhee, Attorney-General, *Timothy S. Hogan* and *George B. Okey*, contra.

EVANS, J.

This action seeks a perpetual injunction against the members of the Industrial Commission of Ohio.

Plaintiff is an employer of labor subject to the provisions of the employer's liability act of this state. In 1914 under the amendment of 1913 of Section 22 of said act (103 O. L., 79), said commission made its finding of facts and certificate to plaintiff, and plaintiff made his election to pay direct the compensation and benefits to injured employees and dependent beneficiaries as in the act provided, and has since and is continuing so to do. Under said act an employer of labor has the option either to pay into the state insurance fund, or to pay direct to his injured employees or to their dependent beneficiaries upon the necessary finding of facts, and certificate of the commission, and giving the bond, and performing all the other condition required by the act. Immediately following such election to pay direct instead of into said fund, the plaintiff contracted with the Aetna Life Insurance Company for indemnity insurance, and said company agreed to indemnify plaintiff against his liability for the payment of any such compensation, benefits and expenses as provided in said act and the amendments thereof.

Said contract of insurance contains no provision for lapse or forfeiture of the same, or of any of plaintiff's rights thereunder for non-payment of any premiums due thereon. It is an indeterminable contract, other than that it provides that either party upon thirty days written notice to the other party may effect the cancellation of the policy of insurance.

Said insurance company was duly licensed to transact business in Ohio, and at the date of said contract authorized to indemnify employers against loss or damage for personal injuries as then provided in Section 9510, Code.

In 1917 said legislative act was amended. Said Section 22 now designated in the code as Section 1465-69 (107 O. L., 159), is so amended that in addition to the necessary facts and requirements provided in the amended act of 1913, the amendment of 1917 provides that such employers "who do not desire to in-

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sure the payment thereof or indemnify themselves against loss sustained by direct payment thereof, may upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation * * * to such injured employees or the dependents of such killed employees.”

Also, the original Section 54, being Code Sections 1465-101, was amended in 1917 (107 O. L., 7), and provides that “all contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen for injury, or to their dependents for death * * * or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages. * * * No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority.”

Also, by the amendment of Section 9607-2 Code (107 O. L., 647), said act now provides for the exclusion of workmen’s compensation in liability insurance.

The petition alleges that the Industrial Commission has passed a resolution to the effect that no such employers shall be permitted to pay direct to injured employees or their dependents compensation or benefits under said act, if such employers contract for the insurance of payment to themselves of such compensation and benefits, or shall indemnify themselves against loss sustained by the direct payment thereof, and that the commission is threatening to give notice of the passage of such resolution, and to revoke all authorizations or findings of facts heretofore issued by the commission permitting such employer to pay direct if they contract to indemnify themselves against such loss.

The plaintiff alleges that its said contract of insurance is a valid, subsisting contract, and that he has the right to continue said contract until the same be canceled as therein provided by one of the parties thereto; that he has the right to cancel said contract, and make contracts of insurance with others to indemnify him against such loss or liability.

He avers that the legislative act of 1917, amending Sections 1461-101, and 1465-69, were not intended to and do not apply to contracts of insurance or indemnity existing when said acts took effect, or to such contracts with individuals, and were not intended to and do not authorize said commission to refuse, revoke or cancel authorizations of employers to pay direct such compensation and benefits upon finding by said commission that such employers desire to so insure.

And avers that if said acts and said resolution and notices were so intended to apply, then that such are unconstitutional and void, in that they contravene Article XIV, Section 1 and Article I, Section 10 of the Constitution of the United States, and Article I, Section 1, Article I, Section 19 and Article II, Section 28 of the Constitution of Ohio.

Plaintiff prays for a perpetual injunction to enjoin the members of said commission from sending out said notices, and from revoking said findings of facts, and from carrying out and effectuating said resolution.

Do said amended acts of 1917 apply to existing contracts for such indemnity insurance? If so, are said amended acts unconstitutional and void?

It is the contention of counsel on behalf of the demurrer to the petition that, by the amendments of 1917, to said act, insurance companies were prohibited from transacting the business of writing liability insurance to employers who had elected to carry their own insurance; that all such contracts then in existence were made void; that this action of the Legislature is a valid exercise of the police power; that by the amendment of said Section 22, if plaintiff elects to take advantage of the privileges offered therein he must comply with the conditions upon which such privileges are offered; that the character of the contracts pleaded by plaintiff are not existing indeterminate contracts, but run from year to year, and when an annual premium is paid, a new contract for another period is made; that the last premium paid was made after said amendments, and that plaintiff is attempting knowingly to prolong an illegal contract when such payment is made.

It is also claimed on behalf of the demurrer, that no vested rights have been impaired by said legislation, and that said amended act is supported by the organic law of the state, and by the decided cases, and invalidates all such existing contracts, and prohibits all such future contracts.

It is the contention of counsel for plaintiff that said amendments do not declare that the prohibition shall extend to existing contracts; that they refer in language to future contracts, not contracts already made; that it requires strained effect in order to construe said sections to apply to existing contracts; that if the language is ambiguous they could only apply to future contracts, and can not have retrospective application, unless it is held that the Legislature has so explicitly expressed its intention.

Also, that said amendments of 1917 are unconstitutional as to prohibiting employers making indemnity contracts; that the Legislature can not prohibit insurance, nor compel a sacrifice of indemnity insurance as a condition to the employer's right to pay compensation directly; that the desire for indemnity insurance can not be made the sole basis of a legislative classification of employers, distinguishing them, as ineligible to pay compensation directly; that such classification is not related to the purpose of the constitutional amendment of the compensation law, and is arbitrary and said act is unreasonable, unconstitutional and void; that as the Legislature can not prohibit employers making insurance contract, it can not annul existing contract. In brief, the above are the leading claims of the respective parties on this demurrer.

The questions here presented, by reason of their importance, have been very fully and ably argued by counsel, and a great many authorities are cited.

I have examined all of them, but it will not be necessary in the opinion to review them, other than such as, in my opinion, control in determining the issues.

I think there is no doubt but that, under the authorities in this state, the subject-matter in said act and the amendments are such as to justify the conclusion that said act was passed in the exercise of the police power.

Such was so expressly held by our Supreme Court in *State, ex rel, v. Cramer*, 85 O. S., 391, wherein the court say that it is clear that the objects and purposes which the Legislature contemplated in the passage of the law in question are sufficient to sustain the exercise of the police power, and the participation of the state in the manner provided. The court further say in that case that "in a general way the police power extends to all the great public needs. It may be put forth in-aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Citing *Canfield v. U. S.*, 167 U. S., 518.

It is not necessary to cite further authorities on this phase of the case, for I think it is clear, that said act was passed in the exercise of the police power.

Are said amendments intended to and do they effect existing contracts of insurance to such employers?

Since the adoption of Section 35 of the Constitution in 1912, and the legislative amendment of Section 1465-69 of 1913 (103 O. L., 79), said workmen's compensation law has been compulsory. Since then all employers of labor in this state employing five or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, are within the compulsory provisions of said act

The amendment of 1917 retains a classification of employers, in that by complying with the required provisions an employer may elect to pay into the state insurance fund the amount of premium determined and fixed by the Industrial Commission, or he may elect to pay individually such compensation to his injured employees and their beneficiaries directly, which shall in no event be less than that paid or furnished out of the state insurance fund, in similar cases to injured employees or to their dependents by such as contribute to said fund.

By Section 35 of the Constitution, laws may be passed establishing a state fund to be created by compulsory contributions thereto by employers, and administered by the state, determin-

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ing the terms and conditions upon which payments shall be made therefrom.

Under the above provision of the Constitution the Legislature had full power to repeal the provisions of such election, and to require all such employers of labor to pay such premiums into the state insurance fund, and to deny the right of election to pay direct to any such injured employees or their beneficiaries. The Legislature by the amendment of 1917, did not see proper so to do, but exercised the option to retain such election, with the addition of a material requirement on the part of any such employer as desired to elect to pay direct instead of paying into the state fund.

By the amendment of 1917 of Section 1465-69, it is provided that such employers * * * who do not desire to insure the payment thereof, or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such fact by the Industrial Commission of Ohio, elect to pay individually such compensation. By this provision an entirely new requirement is incorporated in said workmen's compensation law.

The law further provides that said commission shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify such findings of fact by said commission as to permit such election by such employers. Also, that said commission may at any time change or modify its findings of fact therein provided. Said act does not in express terms provide that it shall apply to existing contracts of insurance. But the act does provide, as a condition for the right of election to pay direct, that employers shall not desire to insure the payment thereof or indemnify themselves against loss sustained by such direct payment. By the provisions of the act, before the commission will be justified in making a finding of fact and a certificate to such an employer desiring to pay direct, the commission must find, in addition to the other conditions, that he must be such an employer of labor as does not desire to so insure. The act being now compulsory as to all such employers, they must either pay the compensation into the insurance fund, or they

must qualify under the statute to pay direct instead of paying into said fund. And by the provision of said amended section of the statute they can not so qualify unless they do not desire to so insure, nor could the commission make the necessary finding of fact and certificate in the absence of such desire not to so insure.

By a reasonable construction of said amended act, in connection with the other amendments above referred to, and of Section 35 of the Constitution, I am of the opinion that the legislative intent was that all such employers of labor in this state shall upon the taking effect of said amendment, elect either to pay into the insurance fund, or elect to pay direct upon complying with all the conditions therein prescribed, including that of not desiring to so insure, and thereby intended the act to apply to any and all such existing policies of insurance. This is because said provisions in the amendment would be rendered inoperative as to those who desire to pay direct if they could continue existing contracts of insurance.

The Supreme Court in *State, ex rel, v. Employers Liability Assurance Corporation*, 95 O. S., 289, decided in January, 1917, construed certain of the amendments of the act of 1913. The constitutionality of Section 54 (1465-101) as amended in 1913, was before the court in that case on a demurrer to the answer. It seems at that time the contracts of insurance contained agreements to indemnify employers for civil liability for injury to employees by the willful act of the employer or his agents, or for his failure to observe any lawful requirement for the safety of employees. The court upheld the constitutionality of the act as it then provided, but entered a judgment of ouster as to the exercise of the franchise of writing indemnity insurance policies to employers other than those permitted by the court, and suspended the operation of ouster for one hundred days in order to permit respondent to conform to the holding.

The judgment in that case did affect existing contracts of insurance, so far as they embodied insurance to indemnify employers on account of injuries to employees by willful act of the employer or his agents, or such as were occasioned by the failure

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of the employer or his agents to observe any lawful requirements for the safety of the employee, and required all such policies to be reformed to conform to the judgment. The judgment was predicated upon the statute as it then provided. The amendments of 1917, providing that all such indemnity contracts of insurance shall be absolutely void, and providing for the additional condition upon which an employer may elect to pay direct, and providing that liability insurance shall not include workmen's compensation were not before the court in that case.

The judgment of ouster in the above case may have had a controlling influence to account for the absence of an express provision in the amendment of 1917 for its application to existing contracts of insurance.

The petition alleges that plaintiff in January, 1914, made and entered into his said contract of indemnity insurance with the said Aetna Insurance Company. This was after the original enactment of the said workmen's compensation act, and was after the amendments of 1913 of said act, and was after said act and amendments were in effect and operation. In this connection, and in connection with the judgment that said act is within the police power, I am impressed with the observations of the United States Supreme Court in *Railroad v. Mottley*, 219 U. S., 467, wherein it held that under the interstate commerce act said existing contract was rendered invalid.

The court say:

"The authorities support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it can not now be enforced against the railroad company even though valid when made. If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution of its power to regulate commerce. No power of Congress can thus be restricted."

The court further say:

"The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject

to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable, or to impair its value. That the exercise of such power may be hampered or restricted by contract previously made between individuals or corporations is inconceivable. The framers of the Constitution never intended any such things to exist."

The contract in question in that case was made several years before the passage of the interstate commerce act, and was a valid act, and was fully performed up to the passage of said act. But because of the provision that after January 1st, 1917, no common carrier subject to the provisions of this act shall directly or indirectly issue or give any interstate free tickets, free pass, or free transportation for passengers, the railroad company refused longer to perform on said contract, and this gave rise to said action and the decision of the Supreme Court that said act invalidated said existing contract.

The Supreme Court of Ohio, in passing upon the constitutionality of Section 27 of said act, in 95 O. S., 248, say:

"The act was passed in the exercise of the police power, fortified by the grant of power contained in the amendment to the Constitution in question, which in itself is but an assertion of the police power. It is an effort in some degree to meet the requirements of new conditions which have come in an age full of revolutionary changes in industrial methods."

Numerous decisions are cited from the United States Supreme Court, and from state courts wherein it is held as to such acts within the police power apply as well to existing as to future contracts. The great weight of the authorities, in my opinion, uphold that doctrine in cases such as this.

The plaintiff cites, among other cases, *State, ex rel, v. Creamer*, 85 O. S., 349, decided in 1912, involving the constitutionality of the original act to create a state insurance fund for the benefit of injured employees, in which the court said in the opinion that "as to the suggestion that this statute impairs the obligations of contracts, it is sufficient to say that it can, of course, not

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affect contracts in existence and unexpired at the time it is put into operation by the employer." Since then Section 35 of the Constitution has been adopted, the said amendments of 1917 have also been enacted, the effect and operation of which, in my opinion, do affect such existing contracts.

I am of the opinion that it is not necessary to comment further on the questions made, or to refer to the numerous decided cases cited. I have carefully examined all of them. Since the enactment of this and similar laws, the weight of the authorities uphold in the great majority of cases the validity of such legislation. The general holding is that as such contracts are made within the reasonable contemplation of such legislation and subsequent amendments thereto to conform to conditions effecting the desired purposes, that all such contracts as tend to the material impairment of the operation of such laws are subject thereto, and if existing at the time of such legislation must be changed or ended, if necessary, to enable a full and complete operation of the law.

The act in question is not retrospective in a case such as this, and does not fall within that objection. It falls within a class of cases in which such contracting parties should reasonably have contemplated, when so contracting, such legislation.

The act is not prohibitive of insurance other than such indemnity insurance, nor is it discriminating, nor can it be claimed to sacrifice insurance further than the requirement to conform to the law in that respect, and this is upheld by the weight of authorities.

The Cleveland Stamping & Tool Company has, since the argument, been made a party defendant, and has filed an answer and cross-petition, to which the other defendants herein have filed a demurrer. The answer does not take issue with the allegations of the petition, and the cross-petition sets forth substantially the same claims that are set forth in the petition. Counsel for all the parties, including those for the cross-petitioner, have submitted the demurrer to the said answer and cross-petition on the argument and briefs made on the demurrer to the petition. The same questions of law are made and are involved in each.

It is the contention of plaintiff that since the Legislature has repealed all regulations as to such indemnity insurance, that in the absence of laws requiring incorporation for the transaction of the business of insurance, that individuals are unrestrained in making insurance contracts with other individuals, and engaging in the business of insurance. This is because, as claimed, that the right to make insurance is an inalienable right protected by the Constitution; that the Legislature can not prohibit insurance, but may regulate it. It is the claim, in brief, that plaintiff, being an individual, can not be restrained by legislation from making indemnity insurance contracts.

I think it is not necessary to dwell at any length on this question. The Supreme Court has held in *Benschler v. State*, 90 O. S., 366, that an insurance contract by an individual is subject to regulation by the insurance department; that even if individuals, acting as natural persons, can carry on the business of insurance, and exercise the functions of such, they must comply with all the laws of Ohio on the subject of life insurance; that it may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual.

Other authorities cited are also of similar purport. I am of the opinion that all such parties to contracts of indemnity insurance, whether individuals or corporations, are subject to the provisions of said act and its amendments, and that the act is not invalid for the reason that it affects individuals in that regard. The demurrers of said defendants to the petition and to said answer and cross-petition are both sustained, and the restraining order heretofore issued is dissolved.

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Mills Operating Co. v. Toronto.

**SLOT MACHINES WHICH ARE WITHIN THE DEFINITION
OF GAMBLING MACHINES.**

Common Pleas Court of Jefferson County.

MILLS OPERATING CO. v. VILLAGE OF TORONTO.

Decided, March 8, 1918.

*Gambling—Slot Machines Will be Treated as Gambling Machines, When
—Gambling Devices Seized and Destroyed Upon Order of Mayor.*

1. A slot vending machine, which upon deposit of a nickel will release a package of chewing gum together with checks in number from two to twenty, good in trade in the store where the machine is installed, is a gambling device, notwithstanding some consideration is received for every nickel played.
2. The fact that the ordinance under which the lessee of such a device was convicted contains no provision affirmatively authorizing its destruction, does not prevent its being destroyed either as a nuisance or as a thing in which the law recognizes no property right.

*J. S. Crawford, for plaintiff.**Edward McKinlay, contra.*

SMITH, J.

The plaintiff is the owner of certain vending machines, which were leased to B. F. Dawson in the village of Toronto for the alleged purpose of selling chewing gum and other trade articles in his place of business. An affidavit was filed before the mayor on December 29, 1917, charging the lessee of these machines with having permitted a game to be played for gain upon or by means of a gaming device, to-wit, a nickel slot machine in violation of ordinance No. 66 of said village.

Ordinance No. 66 reads as follows:

“If any person shall permit any game to be played for gain upon or by means of any gaming device or machine, in any building, booth, arbor, canal boat or water craft owned or controlled by such person, he or she shall, on conviction thereof,

pay a fine not exceeding fifty dollars and pay the costs of the prosecution."

To that charge the defendant entered his plea of guilty and was sentenced to pay a fine of \$25 and costs, which was paid. No error was prosecuted from that judgment. The vending machines are now in the possession of the village of Toronto, and this action is brought by the plaintiff to recover the possession of these machines.

The questions involved are as follows: *First.* Does the title to these machines remain in the plaintiff company? *Second.* Were said machines as constructed and operated, legal vending machines or were they illegal slot machines or gambling devices? *Third.* Does the mayor of the village of Toronto have the authority to destroy or confiscate said machines under ordinance No. 66?

The first and second propositions may be considered together. If these machines are gambling devices, it follows there is no property right in them, and plaintiff could not claim title to them as against the village of Toronto. From the facts it appears that by dropping a nickel in these machines, each person is guaranteed at least one package of chewing gum, and in addition thereto may receive from two to twenty checks in trade from the store of the lessee, Mr. Dawson.

It also appears from the cut that certain characters are on these machines representing certain cards, and that in accordance with the order or arrangement of these cards after a play would depend whether or not the player would receive one package of chewing gum and possibly two to twenty trade checks in return. The checks might be exchanged for articles in Mr. Dawson's store.

From these facts it clearly appears that this is a gaming or gambling device. There seems to be the impression abroad among the lessees of these machines so long as the player receives something of value in return for the money played they are within the law and can not be prosecuted for conducting a gambling machine or device. That impression is clearly erro-

neous. Wherever the element of chance enters into the playing and the player has the opportunity to receive something for nothing, something without consideration, it comes within the provision of the law, prohibiting the operation of a gambling machine or device. There is no dispute among the authorities upon that proposition.

Wise v. Martin, 7 N. P., 660:

“The device used in the transaction which is the cause of this action is known as a slot machine, and is operated by inserting in a slot at the top of the machine a coin, which finds its way into one of several compartments at the bottom, according as it is deflected to one side or the other by pegs or other obstructions against which it may chance to strike. In my opinion it is clearly within the definition of gambling machine, in Section 6394, Revised Statutes, the keeping of which for the purpose of gambling is punishable by fine and imprisonment and is therefore a crime under the laws of the state.”

It is the element of chance in the game that makes it illegal; whether one receives something or whether he receives nothing is not material. If that were not the case every game of chance, every gambling device, could be legalized by giving to the player some consideration for the money which he wagers upon the game. These machines are therefore clearly within the law prohibiting the operating of a gambling device or machine as provided in the ordinance of the village.

The question further arises, does the village have the authority to confiscate these machines? It is urged by counsel for the plaintiff company that there having been no provision in the ordinance for the confiscation of these machines that no penalty could be added to that already expressed in the ordinance. The confiscation or destruction of gambling devices is not, however, in the way of penalty. It comes within the provisions of the police powers of the city or state. It has always been held that gambling devices or equipment are inimical to the public good. They are therefore a nuisance and it follows that they could and should be destroyed. It was not only within the authority of the village officers to confiscate these machines, but it was their duty.

This defendant was charged with having kept a gambling device upon his place. He entered his plea of guilty to that charge. For the authorities now to turn that gambling device back to this man or to its owner would in fact be encouraging him to continue the conduct of his wicked and illegal business.

As was said in the case of *Engelhardt v. Kunning*, 10 N.P. (N.S.), 609, 611, by Judge O'Connell from Hamilton county, in which it was sought to recover from the mayor the value of certain gambling devices:

"The law does not throw its protecting arm about gambling devices or gambling instruments, nor does the law recognize any property rights existing in gambling devices for the use of such devices and instruments are subversive and destructive of the best interest of society. The plaintiff should have prosecuted proceedings in error were he dissatisfied with the proceedings before the mayor. He can not maintain his first cause of action in view of the facts disclosed by the mayor's court records and the evidence produced in this court."

In that case the plaintiff sought to recover the value of his machine after a conviction. In the instant case the defendant has entered his plea of guilty. He has admitted that these are gambling devices. He can not recover these from the village for the reason that the law recognizes no property interest in them. The village has a right to destroy them. There is perhaps no form of gambling that is more subversive to public good than these gaming machines. They induce and encourage boys to play them and thereby encourage and develop the latent spirit of gambling, which is so prevalent and prominent among the American people.

It follows that the title to these machines is not in the Mills Operating Company for the reason that they are gambling devices, and that they were conducted illegally for the reason that the defendant in the criminal case admitted himself that they were gambling devices. The mayor, therefore, has authority to take possession of them, destroy and dispose of them as he may see fit.

A finding will be had here in favor of the defendant and against the plaintiff.

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PROBABILITY AS TO THE CAUSE OF A FIRE.

Common Pleas Court of Franklin County.

THE COLUMBUS HOOP COMPANY ET AL V. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY.

Decided, April 27, 1918.

Probability—Not a Sufficient Basis for a Conclusion—Unless Founded Upon a Reasonable Inference—Insufficient Evidence that Fire Was Started by Sparks from a Locomotive.

In an action against a railway company for damages sustained by fire which it is alleged was started by sparks from one of the defendant's locomotives, a motion for a directed verdict for the defendant lies, when the circumstances shown to have existed at the time fail to afford a basis for a fair and reasonable inference as to the cause of the fire, but rests wholly on guess and conjecture.

G. E. Bibbee, for plaintiff.*F. C. Rector*, contra.

KINKEAD, J. (Orally).

I did not intend to have the jury present, but in view of my conclusion it does not make any difference.

I will undertake to announce the reasons for the conclusion reached—not in as methodical order as I would like; trial judges have to press hard on the bit all the time and do not have the time to get their thoughts together in as good order as does a reviewing court.

I have given this case more than ordinary attention from the time it began, as it presents an interesting point of practice.

The evidence offered by plaintiff discloses that the fire was first discovered by the night watchman when he was in the boiler room, while he was engaged in the act of taking ashes from the boiler. He happened to think that it was his time to report, and he went to the clock; and while about that task he says he discovered smoke. He found the fire on the east side of

the sawmill building. The witness states that in looking for the fire he was probably forty or fifty feet from the engine room. The fire originated on the east side of the building among pieces of bark and slats, edging sawed off from the rip saw. The fire was located at the edge of the shed. The watchman states that when he went back near the boiler wall he saw the fire under the floor. He testifies, using his language, "It seems I heard or saw an engine, or something, go up, but I could not tell positive at what time it was." In answer to a question, "Where were you when you observed this," he stated that he was in the boiler room. The witness did not state positively that he heard an engine, or, as he uses the language, "he heard something go up." He qualifies himself by stating that he would not state positively.

The testimony of the night watchman does not establish any fact concerning any train or engine passing along the railroad. It consists of mere guess and speculation. The remaining evidence offered by plaintiff consists of testimony of train dispatchers and operatives of trains or engines as to the movement of trains or engines along the line of defendant's railroad near the time of the fire.

The fire originated some time very shortly before 5:35 P. M., at which hour the alarm was turned in. The testimony concerning the movement of trains or engines tends to show that certain trains or engines passed at Fifth avenue and First avenue. The train dispatcher located at First avenue testifies as to engines numbered 9822 and 7380 passing his station going north. Yard engine numbered 7380 passed the Fifth avenue station, but Tucker states he has no further record of the movements of that engine for the reason that stations north were closed. Engine 7380 returned to First avenue at 5:39. Tucker states that he sent 7380 up on the hill to help out No. 10, which was stuck. Tucker's evidence does not show where the hill was located. Conductor Holt testifies that he was working around the Fair Ground and went south, passing the hoop factory, and that they usually turned in at six o'clock. The inference is that this work engine passed plaintiff's place, but at what precise hour does

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not appear. Engine No. 6823 left Walsh at 4:36 and arrived at 4:45. The next number passing the station of the train dispatcher was No. 35, a south-bound passenger train. It left Walsh at 4:36 and arrived at Fifth avenue at 5:07. That is the only engine or train that passed the hoop factory near the supposed time when the fire probably originated. All we have touching the movement of engine No. 7380 is the statement by Tucker as to the time it left and returned. The statement by Tucker that he sent it to help No. 10 over the hill must be regarded as incompetent—that is, his mere statement of what he sent it for. His evidence that it left his station and that it returned at 5:39 and all of the information that he gathered from the train sheet would be regarded as competent. Where it went and what it did does not appear by competent evidence. It appears, however, that No. 10 was a passenger train and that it passed Fifth avenue station at 4:05 and passed Walsh station at 4:22. In giving the trains passing Tucker, a station after Panhandle No. 920, which passed at 5:11 going north, Tucker states that the next one to pass his station was at 5:13, being yard engine 7380, which followed the passenger train, which must have been the Panhandle train, although it does not appear what character of train it was in the other places; and that it passed Fifth avenue. Even if we should consider Tucker's testimony that he sent 7380 to assist No. 10, which I say we can not do, the competent evidence shows that No. 10 passed Walsh going north at 4:22. It follows that if engine No. 7380 passed Tucker's station following Pennsylvania train No. 920, train No. 10 would probably be gone before the other engine reached its assistance. Or, if that be not so, and we are indulging in supposition upon incompetent testimony, if 7380 by any stretch of imagination actually did go to the assistance of No. 10, it would have consumed the time between 4:22, when No. 10 left Walsh, until 5:39, when it returned to its station, which is altogether too much time to be consumed in that act.

Opposing this evidence, brought out, in the development of plaintiff's case, we have the fact that the night watchman continually smoked; that about every employee about the establish-

ment smoked about the premises. And then there is the testimony that some of the men would pass out of the door of the boiler room where the night watchman first discovered the smoke. There is also the testimony that sometimes a sparks shot out from the stacks when they were probably putting in more fire.

It is to be observed that at this stage of the case there is no disputed evidence. There is no conflict in the evidence offered by either side. The evidence offered by the defendant consisting of the various witnesses called, who were employees, does not contradict anything that is claimed by the plaintiff. It is an effort on both sides to make the facts appear to be as they actually were. Another reason for that comment will be made afterwards. This court is, therefore, considering this case not only upon a motion made at the close of the plaintiffs' case, as Mr. Rector will have it, to direct a verdict, or, as I would prefer it, to direct a non-suit, but the court is also called upon at this stage of the case to consider, and may consider, all of the evidence in arriving at its conclusion, if there is no dispute. It may enter up a judgment one way or the other upon the undisputed testimony, or upon the undisputed evidence. The question, however, presented by a motion interposed at the close of plaintiffs' case and renewed at the close of all the evidence, is whether there is any evidence which tends to prove or disclose an inference that fairly and reasonably shows that the fire was probably caused by a spark or sparks emitted by an engine operating on the line of railroad of the defendant.

It is stated in the case of *Red River Lead Co. v. Railroad Co.*, 123 Mo. App., 394, cited by counsel for the plaintiff—

“A bare possibility that sparks from an engine on defendant's line might have kindled the fire would not, it seems to us, justify a finding that it was thus kindled. We think the testimony ought to go to the extent of proving the probable origin of the fire was cinders or sparks emitted from an engine.”

The court in that case adverted to the fact that it was not necessary for it to consider whether or not a mere possibility would be sufficient to carry the case to the jury, and stated that

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it was not called upon to consider the question, because there was a reasonable probability presented by the evidence which was sufficient to warrant the submission of the case to the jury.

In this state it is well understood that the measure of proof that is the standard of our course of procedure is that only the appearance of truth must be shown, and, therefore, a probability is sufficient upon which to found a conclusion, a verdict and judgment. A probability is an element which addresses itself to the reason. A jury may determine an issue of fact as its probability or improbability may appear to it from the evidence. Probability is a state of being probable. To conclude that there is a probability of the existence of a fact, a reason for believing in the existence of such fact must be ascertained. If there is no reason for such belief, there is no probability of the existence of such fact. *Moody v. Peirans*, 4 Cal. App., 411; *Ins. Co. v. Weide*, 11 Wall., 438; *Mims v. State*, 141 Ala., 93.

And then again, as some courts have put it:

“To conclude that an act probably occurred from a given cause is to decide that more evidence shows it to have been so caused than does any opposing evidence disclose it to have been otherwise caused, although it leaves some room for doubt.” 34 Wash., 379; 29 Okla., 19; 8 Cal. App., 420.

There is a marked distinction between a *probable* cause and a *possible* cause, and to aid it the following definitions or conception of what constitutes a possible or probable act are cited. Results or acts which are only possible can not be spoken of or considered as either probable or natural. What is *probable* or natural are such events, acts or results from acts which are likely to happen, and which for that reason may be reasonably foreseen. Things, acts or results which are merely *possible* may never happen, while those that are natural or probable are those which do occur or are likely to happen, and may become a matter of inference and conclusion. (See 209 Pa., 128; 117 Pa. St., 300; 2 Am. St., 672.) Things, acts or events that are regarded as only possible do not warrant or justify an inference, and hence are not subject to judicial cognizance.

P., C. & St. L. Ry. v. Scherer, 205 Fed., 357:

"Where one of two or more things may have been the cause of an injury, for one of which defendant is responsible and for the others of which he is not, it is not permitted to speculate between the several causes, and to find that defendant's negligence was the real cause, in the absence of satisfactory foundation in the testimony for that conclusion."

L. & N. R. Co. v. Bell, 206 Fed., 395 (Warrington, Knappen, Denison, Judges):

"The jury may not infer defendant's causal relation to plaintiff's injury, yet plaintiff's evidence need not exclude every other possible source of injury; it is sufficient if the inference of defendant's liability is fairly and reasonably probable and distinctly more probable than other suggested explanations."

R. R. v. Jones, 192 Fed., 769, op. p. 774. Opinion by Warrington, J., quoting from opinion of district judge:

"It is true that where the testimony leaves a matter uncertain, showing that a number of things may have brought about the injury, * * * the facts should not be left to the jury to be determined upon mere *probability*, thereby turning them loose in the field of conjecture and leaving the matter to be determined by guess. (Sanborn, Dist. J.)

"Where there is a reasonable inference from circumstantial evidence, of a substantial character, indicating that the accident was due to the defendant's negligence and breach of duty for which it was responsible, as distinguished from mere speculation and guess."

In trials of fact the proof comes either from those who speak from actual personal knowledge of the existence of fact, or it is to be inferred from other facts, the probable truth of which is established. A fact in dispute may be shown in part by direct and part by inference. That which is shown by persons having personal knowledge is direct evidence; proof of collateral facts which have a connection with the fact in controversy is circumstantial evidence.

It is not necessary in legal procedure to be absolutely certain of the existence of a fact; it only need to appear that a claim is

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probably true, and, therefore, it logically follows that there may be some room for doubt in the minds of the triers of fact when it is decided that a fact is probably established. The measure of proof upon which we found judgment and action in civil actions, of course, is wholly unlike that in criminal procedure where the triers of fact must be convinced of the guilt of the accused beyond a reasonable doubt. Even in the latter class, absolute certainty is not required.

This case rests wholly upon circumstantial evidence, and to the division thereof classed as uncertain, when the conclusion does not necessarily follow but is probable only, and is obtained by a process of reasoning and inference. I think this rule has much force in the consideration of this question. We seldom encounter a case where the line must be drawn so closely between a probability and a possibility as must be done here.

This case depending upon circumstantial evidence, involves a process of deduction and inference. Circumstantial evidence consists of proof of certain facts and circumstances, from which the jury may infer other connected facts which usually and reasonably follow according to common experience. Evidence of this character is classed as certain and uncertain: (1) Certain, where the conclusion in question necessarily follows; (2) uncertain, when the conclusion does not necessarily follow, but is probable only, and is obtained by a process of reasoning and inference. Note, 97 Am. St., 772-73. The court in passing upon a motion for a directed verdict, indulges in the same process as would the triers of fact. The court is called upon, in the first instance, to determine whether or not this inference reasonably and fairly supports a probability; whether it *tends* fairly and reasonably to support a probability. If it does, then the question is one for the jury; if it does not so tend, then it is a question of law for the court.

The inference to be drawn from all the circumstances must be such as to show a fair and reasonable probability that the fire was caused by an engine of the defendant. If such inference is not supported by a fair and reasonable basis, if it rests wholly on guess and conjecture, then there is nothing for the jury to

decide. The fact that liability is imposed upon railroad companies for loss by fires regardless of the exercise of reasonable or due care, in no way differentiates such liability from others founded upon pure neglect, so far as concerns the usual and ordinary process of determining fault and liability. So I take it that this court is warranted in acting as the court did in the Big Four case cited here, *McQuade v. Big Four Railroad*, a case which had been tried by two branches of this court, a verdict rendered in favor of the plaintiff in each case, and set aside in each instance. The case went to our court of appeals, and was reversed and came back and was tried the third time, when judgment of non-suit was entered up. It involved the determination of how a man came to his death. It involved the same process of reasoning by inference. Reasoning by inference in a case like that is not different from the process of reasoning in a case like this.

If it is made clear in any case that a jury can not arrive at a conclusion except by speculation and guess, there is nothing to be submitted to it.

The case presented here differs wholly from others cited involving fires by railroads. It may not be worth while referring to it, but the case cited from Missouri, mentioned a moment ago, is where a barn located along the line of the railroad had caught fire supposedly by sparks emitted from an engine which dropped upon the roof. *Red River Lead Co. v. I. M. & S. R. Co.*, 123 Mo. App., 394; 101 S. W., 636. It appears that the grade at the point involved was quite heavy, the effect being to increase the difficulty of drawing the trains over the track, and to draw them a strong head of steam was required, causing them to throw cinders and sparks to a considerable distance.

In the present case counsel for plaintiff sought to draw the inference that engine 7380 when it was supposed to have gone north to help No. 10 over the hill would go in such a manner that possibly it would emit sparks. The court was right in eliminating that engine altogether, because, as the evidence was analyzed, it has not been made to appear here at all, except by conjecture and supposition, that that engine went up to help No.

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10 out. On the contrary, the reasonable inference from the time allotted and the distance, would tend to show otherwise. Furthermore, the evidence of the engineer and of the fireman upon that engine was to the effect that the train had not been above Fifth avenue.

There is no conflict in the evidence since the court considers the statement by Tucker that he sent an engine upon the hill as incompetent evidence, because it is not a part of the train sheet or of the record he kept. It is a volunteer statement. Such a thing might have happened that he sent it there and that it never went. Of course, it is not competent. It clearly shows from the deduction made by the court from the actual dates and times of engines and trains from evidence not in dispute, that such testimony as that of Tucker, rejected by the court, is not sufficient to found judgment upon.

Another observation is made. So far in this state it has never been held that the evidence which this court permitted to go in of the witnesses who testified that they had observed sparks going from an engine passing along the highway as far as the distance between where this fire took place and the train, was competent evidence. The evidence that was offered in the Missouri case (123 Mo. App., 344) and the evidence that was offered in the federal case (206 U. S., 395) is wholly unlike that which was offered here. The court was liberal in the beginning in allowing that to go in; it postponed the time of exercising its judgment until it felt reasonably certain of the proper conclusion.

Therefore, the judgment of the court is that upon the evidence offered by the plaintiffs in support of their case, as well as upon all of the undisputed evidence, the plaintiffs are not entitled to recover, and therefore a verdict is directed in favor of the defendant.

Mr. Hoover: Note an exception on behalf of the plaintiffs.

MEMBERSHIP IN A BUSINESS EXCHANGE NOT TAXABLE.

Common Pleas Court of Hamilton County.

JOHN M. ANDERSON v. PETER W. DURR, AS AUDITOR, ET AL.

Decided, April 28, 1918.

Taxation—Enjoyment of a Privilege Not Property—Membership in the New Stock Exchange Not Taxable in Ohio.

Membership in the New York Stock Exchange does not constitute property within the meaning of the law of Ohio relating to taxation, but is a mere personal privilege, and is not taxable even though the owner of such a membership is a resident of Ohio.

Murray Seasongood, for plaintiff.

Walter M. Locke, Assistant Prosecuting Attorney, contra.

It was alleged by the plaintiff and admitted by the defendants that the defendant county auditor was about to evaluate the membership of the plaintiff in the New York Stock Exchange, place the same on the tax duplicate and assess a tax thereon. Plaintiff claimed that such membership is not taxable property or investment under the laws of Ohio; but that if it were taxable, its situs is not in Ohio, even though the owner's residence is in this state.

Before this case was decided Hon. Smith Hickenlooper, then counsel for defendants, in a letter addressed to the court, conceded that under the peculiar wording of General Code, 5376, as to the seventh item of the tax return, it is not broad enough to include intangible or incorporeal personal property, following *Chisholm v. Shields*, 67 O. S., 374, 378, as to the meaning of the word "otherwise," and, also, opinion of Judge Kunkle in *Whitely v. Arbogast, Treasurer*, 6 N.P.(N.S.), 313 (affirmed by the Supreme Court without report). However, it was contended in said letter that if such membership were taxable property, it could be taxed in the county of the owner's residence.

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CALDWELL, J.

The court finds that the plaintiff has, in this county, a letter notifying him he has been elected a member of the New York Stock Exchange. This gives him the privilege of transacting business during certain hours and under certain conditions in a building in New York City and nowhere else.

This mere personal privilege is not, in the opinion of the court, property within the tax laws of Ohio.

Therefore the prayer of the plaintiff will be granted and the temporary injunction heretofore issued will be made perpetual.

**OFFICER NOT PERSONALLY LIABLE UNDER A CONTRACT
EXECUTED IN HIS OFFICIAL CAPACITY.**

Common Pleas Court of Hancock County.

WILLIAM L. DAYTON ET AL V. ALVIN S. THOMAS ET AL.*

Decided, April Term, 1916.

Public Contracts—Officer Not Personally Liable Under a Contract Executed as Such Officer—Unless Expressly Made so by Statute or Agreement—Board of Education Enters Into a Contract for Repair of School Building for Which no Appropriation Had Been Made—Action to Recover from Members of the Board Personally.

1. In the absence of a statute to that effect, a public officer or agent, acting in good faith, is not personally liable on his contract entered into in that relation with another, unless by express understanding to that effect.
2. Members of a board of education are not officers or agents of the "state, county, township or municipal corporation" within the contemplation of Section 17, General Code, and are not personally liable under the provisions thereof in the making of a contract without an appropriation having first been made therefor as required by Section 5660, General Code.

Chester Pendleton, for the plaintiff.

John E. Priddy, contra.

*Affirmed by the Court of Appeals, March 27, 1917.

DUNCAN, J.

Heard on demurrer to petition.

This suit is brought to recover an alleged balance of a *quantum meruit* for certain repairs made by the plaintiffs upon the Crawford school building of this city in the years 1912 and 1913. It is brought against the defendants, members of the board of education, individually, for the reason stated in the petition that a former suit brought against the board in its official capacity was defeated upon the ground that the clerk of the board did not certify when the contract for said repairs was made that the money required for the payment of the obligation was in the treasury to the credit of the fund from which it was to be drawn, or had been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose. This certificate is made an absolute requirement by Section 5660, General Code, and any contract entered into contrary to the provisions thereof, the next section provides shall be void, except those relating to the employment of teachers, officers and other employees of the board.

Thus failing in their former suit against the board, the plaintiffs bring this suit against the members of the board individually. They say that the board designated Reginald Burket, one of its members, as a committee to look after and care for said Crawford Building and to put the same in a proper state of repair for use as a public school and duly empowered him to cause all proper repairs to be forthwith made thereon, and in pursuance of said authority the said Burket employed them to do said work, and that they did said work amounting to the sum of \$373.86, and that no money had been previously appropriated for said purpose, that the members of said board were not authorized to make said contract in their official capacity and that their attempt to thus bind the board was wholly unauthorized and contrary to the statute in such case provided, and they make the claim that by reason of the premises the defendants became personally liable to them. They further say that the board has paid \$203.06 of the amount out of the public funds, but has since rejected the

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balance of \$170.26, which they claim with interest thereon from May 20, 1913. A statement of the account with all credits thereon is referred to and is attached to the petition.

Each of the defendants demur to the petition on the ground that it does not state a cause of action against him.

From the allegations of the petition, which I have attempted to make as full as possible without stating the same verbatim, the case is resolved into the sole proposition as to whether the members of a board of education are personally liable upon a contract for the repair of a public school building intended in all respects as the contract of the board, both by the members and the party doing the work. I would say that they are not. It can not be presumed that a public officer intends to assume the public burdens or that persons dealing with him rely upon his individual responsibility. "On the contrary," says Judge Story, "the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts, far beyond that of any private man; and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy." Of course, he may be held personally liable on a contract made in behalf of the public, if the intent to become liable clearly appears or the officer is guilty of fraud or misrepresentation to the plaintiff's injury, but neither is alleged in this case. Mechem, Public Officers, Sections 805-812; Mechem, Agency, Sections 426 and 550; Story Agency, Section 302.

Chief Justice Dagget of Connecticut, in the course of his opinion in *Perry v. Hyde*, 10 Conn., 329, 338, states the rule thus:

"I am aware, that men acting for the public or for others as individuals may bind themselves; but I do not believe, that in any case, persons acting as agents for the public, and known as such, and not making themselves liable by anything amounting to a personal contract, unless there be fraud, misrepresentation or warranty, can ever be rendered personally liable, even if no other person is liable. I think the doctrine of all the cases supports this position."

Chief Justice Emmett of Minnesota, in *Sanborn v. Neal*, 4 Minn., 126, 130 (77 Am. Dec., 502, 506), lays down the rule in this way:

"When public agents, in good faith, contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become individually liable, unless the intent to incur a personal responsibility is clearly expressed, although it should be found that through ignorance of the law they may have exceeded their authority. * * * In this as in all other cases, the intention of the parties governs, and when a person, known to be a public officer, contracts with reference to the public matters committed to his charge, he is presumed to act in his official capacity only, although the contract may not in terms allude to the character in which he acts, unless the officer by unmistakable language assumes a personal liability, or is guilty of fraud or misrepresentation. Being a public agent with his powers and duties prescribed by law, the extent of his powers are presumed to be as well known to all with whom he contracts as to himself. When, therefore, there is no want of good faith, a party contracts with such an officer with his eyes open, and has no one to blame if it should afterwards appear that the officer had not the authority which it was supposed he had. Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large class of offices which requires a sacrifice of time and perhaps money, but affords neither honor nor profit to the incumbent. Where one acts as the agent of a private person, the rule is different."

To the same effect are *McCurdy v. Rogers*, 21 Wis., 197; *New York, etc., Co. v. Harbison*, 16 Fed., 688.

Two cases from New Jersey, *Bay v. Cook*, 22 N. J. Law, 343, and *Timken v. Tallmadge*, 54 N. J. Law, 117 (22 Atl., 996), have been cited as holding the contrary doctrine, but these cases are distinguished from the case at bar by the fact that in those cases the officer had no semblance of public authority to make the contract sued on.

But it is contended that if this contract is void because said Section 5660, General Code, was not complied with, that the members of the board of education are liable individually under the provisions of Section 17, General Code. Said section reads as follows:

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“An officer or agent of the state or of any county, township or municipal corporation, who is charged or intrusted with the construction, improvement or keeping in repair of a building or work of any kind, or with the management or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township, or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been duly authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he shall be personally liable thereon, and the state, county, township or municipal corporation in whose name or behalf the contract was made, shall not be liable thereon.”

It will be observed that the officer or agent who shall become personally liable under the provisions of said Section 17 by making an unauthorized contract is such as may be an officer or agent of the *state, county, township or municipal corporation*, and that the section does not mention nor extend to an officer or agent of the *board of education of a school district*.

This section was enacted in 1857 (54 O. L., 77). Said Section 5660 was enacted in 1896 (92 O. L., 341). It was only by virtue of the non-compliance with the provisions of the latter section that the plaintiff failed in his former case. Prior to the enactment of said section the board of education would have been liable under the facts alleged. But said Section 17 is not broad enough, nor was it intended when enacted to include the officers or agents of a board of education. The intention of the Legislature is manifest by the reading of the original section as it appears in the yearbook. It has not been amended since in any way. It has gone through two general revisions of the statutes, one in 1880 and the other in 1910. The phraseology of the section was changed a little by the codification of 1880, but not by the codification of 1910. Wherever the words “municipal corporation” appear as the section now reads, the words “city or incorporated village” were used in the original section, changed by the codification of 1880. But this, I claim, does not change its meaning. A board of education is not a

municipal corporation, nor was it the intention to include it by this change of words. This would seem to be conclusive as the enactment of said Section 5660 was not even in prospect at that time. Besides, the act authorizing the appointment of the codifying commission (72 O. L., 87), too long to quote here, authorized no changes in the statutes except in phraseology, to make them more concise and comprehensive, but without changing their meaning.

After quoting from the language of the act, Judge Bradbury, laying down the rule in *Collins v. Millen*, 57 Ohio St., 289, uses this language at page 296, viz:

“This authority was broad enough to warrant changes of phraseology, and in fact, expressly authorized it, but the power to alter the meaning of the statutes by the insertion of qualifying clauses does not appear. The statutes as revised by the commission appointed for that purpose, were, when reported to the General Assembly passed by that body with such amendments as it chose to make. It is quite reasonable to infer, as we have before shown that this court has done, that mere changes of phraseology made by the commission and adopted by the General Assembly, do not change the meaning previously borne by all statutes, unless the difference between the language of the two statutes evinces an intent to do so.”

See also, *State v. County Comrs.*, 36 Ohio St., 326, 330; *State v. Stockley*, 45 Ohio St., 304, 308; *State v. Stout*, 49 Ohio St., 270, 284.

Applying this rule as well as my general understanding to determine the meaning of the words “municipal corporation,” and being of the opinion that it does not include the board of education as used in said Section 17, there is nothing left upon which to base the contention that the officer or agent of the board of education can become personally liable under the provisions of said section.

Holding these views, the demurrer to the petition will be sustained.

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LEADING QUESTIONS ASKED BY THE TRIAL JUDGE.

Common Pleas Court of Franklin County.

PATRICK J. GILHOOLEY v. THE COLUMBUS RAILWAY,
POWER & LIGHT COMPANY.

Decided, May, 1918.

*Trial—Sometimes the Duty of a Trial Judge to Interrogate Witnesses—
May Ask Questions Not Proper for Counsel to Propound—Courts do
Not Take Judicial Notice of Municipal Ordinances—Defendant
Need Not Plead an Ordinance Upon Which He Relies to Defeat
Plaintiff's Claim.*

1. The universally accepted rule is that courts of general jurisdiction do not take judicial notice of municipal ordinances. The rule has always been that where a plaintiff relies upon such an ordinance as the gist of his cause of action the same must be specially pleaded as one of the facts upon which he relies. Where a defendant relies upon such ordinance to defeat a plaintiff, it need not be pleaded *Meek v. Pennsylvania Co.*, 38 O. S., 632; *Variety Iron Co. v. Poak*, 89 O. S., 297; *Schell v. DuBois*, 94 O. S., 93, distinguished.
2. A trial judge not only has the right to ask questions of witnesses, but it is his duty to do so whenever it is necessary to develop the truth. He may ask leading questions in cases where it may be improper for counsel to propound them.

F. S. Monnett, for plaintiff.

Booth, Peters, Pomerene & Boulger, contra.

KINKEAD, J.

This action was brought for personal injury alleged to have been caused by the negligence of defendant. Upon trial the jury returned a verdict in favor of defendant. It is now submitted upon motion for a new trial in which the usual grounds are set forth as well as some unusual complaints.

Complaint is made of alleged "irregularity of the court in the cross-examination by direct and leading questions of wit-

nesses, adverse to the plaintiff's evidence, causing the jury to give undue weight to the construction of the evidence during the trial as appears of record." The record does not support such claims. The charge that the court caused its construction of the evidence to be given undue weight by the jury by questions propounded by it is without foundation and support.

The fact about the matter is that the examination by plaintiff was so unsatisfactory in respect of clearness and definiteness that it became necessary for the court to ask questions to clear up some matters in order to obtain an intelligent view to determine how to charge the jury; and in other instances the court came to the rescue of plaintiff when his counsel seemed unable to ask questions that would pass muster on objection, in order to get along.

The following quotation is pertinent to the complaint made by counsel:

"The unthoughtful advocate resents intervention by the judge, and when truth developed through question propounded by the court militates against one side adverse criticism follows. The desire to win may control a party and counsel in avoiding or omitting lines of inquiry which may tend to develop material matters. Until called upon to discharge the solemn and responsible functions of a judge, they can never appreciate the high sense of obligation under which they act. * * * Let it be remembered that counsel seek only for their client's success, but the judge must watch that justice triumphs. A judge is not a mere moderator between contending parties; he is a sworn officer, charged with grave public duties. He is charged with the grave duty of maintaining the truth and preventing wrong. For the accomplishment of such purpose he has large discretion. * * * It is the well settled general doctrine by numerous adjudications * * * that it is not only the right but the duty of the judge * * * to ask questions of witnesses whenever it is necessary to develop the full truth of the case. * * *

"It would indeed be a reproach to our system if a judge were required to see the right thwarted, truth concealed and injustice done through failure to ask material questions. Decisions are numerous wherein it has been decided to be within the discretion of the presiding judge to question witnesses during trial, etc.

"It is said there is no limit to the right which belongs to the court of interrogating witnesses, etc. Ohio Civil Trials, Section 567."

The foregoing is the rule deduced from decisions but the writer of the volume cited adds the following:

"That is putting it too strongly. Good taste and proprieties suggest limitations, which make for the benefit of the judge as well as of parties. Besides the authorities have very clearly outlined the occasions when a judge may ask questions, and have suggested the manner in which they should be put. * * * No objection may be made to leading questions by the court," Ohio Civ. Tr., Section 568.

The court may ask leading questions where counsel can not do so.

"The examination by the court should never have the appearance * * * such as may be calculated to lead the jury to infer that the judge has decided conclusions in his own mind," etc. Ohio Civ. Tr., 568.

"The judge should scrupulously avoid all semblance of partiality. To do this it is not difficult to frame a question calling for some omitted matter or to so frame questions as to disclose a purpose to ascertain the truth without appearance of opinion." Ohio Civ. Tr., Section 568.

A desire to disclose that the writer has personally given much time and consideration to the right and duty of the court respecting the matter of examination of witnesses by the court may justify the foregoing citation. The endeavor has always been to call into judicial service the precepts of law and its ethical principles. And it is much more conducive to correct and just administration of justice for lawyers to do likewise. Professional and judicial ethics require sincere purpose on the part of both counsel and court. Much might be said concerning the vice and virtue of "leading questions." It is fundamental that the court may within its discretion permit leading questions to be asked. Having such discretion of course it is to be presumed

that the court is exercising that discretion when it asks a leading question. One of the vices of leading questions is when they are designedly framed to gain improper advantage, to distort the facts or to improperly adduce favorable facts only, when the same might not be otherwise developed.

“Leading questions may tend to deceive or mislead a witness by forming a belief in accordance with the suggestion of the question, his answer being rather an echo to the question than suggestion of memory. Moore on Facts, Section 814.

“It is a good point of cunning for a man to shape the answer he would have in his own words. * * * Witnesses whose memories are prodded by the eagerness of interested parties elicit testimony favorable to themselves are not usually to be depended upon for accurate information. 156 Fed., 721. * * * Testimony thus developed is apt to be of little value because the answer chiefly comes from the partisan examiner because the language is his rather than that of the witness.” Ohio Civil Trials, Section 576; 156 Fed., 721; 73 Fed., 239.

The primary purpose being to ascertain and develop truth in particular circumstances, this may sometimes justify or demand leading questions. It may be difficult to distinguish between questions which are objectionable because leading, and those permissible because the circumstances warrant the exercise of discretion to permit the same to be asked.

Certainly a judge can hardly be charged with prodding a witness with the eagerness of an interested party so as to elicit testimony favorable to one party or the other. Nor can it be said that he is a partisan examiner. Not being in such position the natural presumption is that the court acts with perfect impartiality, with a desire to ascertain a material fact, or to develop truth. Of course the court should avoid asking “A question in such leading form as to indicate to the jury the mind of the court on a controverted fact.” Ohio Civ. Tr., Section 568.

“No objection may be made to leading questions by the court.” *Id.*, *State v. Marshall*, 105 Iowa, 38.

Since counsel has made objections to questions by the court, and that the same were leading, it was considered a fitting occa-

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sion to recall the well settled rules on the subject for any good that might result, as well as to throw light upon the objections made to questions by the court.

The case at bar was an exceptionally interesting one from certain standpoints. It was strongly contested on both sides. According to the contentions of defendant the insinuations were that plaintiff was an imposter, that he suffered no such injury as claimed by him.

On the side of plaintiff his case rested entirely on his own testimony, corroborated by the statements of his wife that he came home about that time with some injury to his person, and that he had consulted a physician, Dr. Welsh, within a day or few days thereafter. Dr. Welsh, however, gave strong testimony tending to show that his injury did not come from the cause claimed by him.

The record discloses a very unusual condition which the jury solved in favor of defendant.

We have carefully gone over the record, and particularly the questions propounded by the court to discover whether the interpretation of the attitude of the court made by counsel is in any wise warranted. Our examination shows that we helped, rather than injured counsel for plaintiff in the matter of examination; that we cleared up matters left vague by him. It required careful close watching to discover the meaning and purpose of counsel for plaintiff, not alone to guard against incompetent matters but to understand the scope of the testimony. It might as well be frankly stated that his examination was not always such as to make matters perfectly plain and clear. Some inquiry by the court was therefore essential.

The rule is that a court may propound such questions as may throw light upon the statements of witnesses, "particularly so if questions put by counsel are not well calculated to develop material facts." Ohio Civ. Tr., Section 567; *State v. Spiers*, 103 Iowa, 711.

The court may within its discretion recall a witness and examine him (Ohio Civ. Tr., Section 569; *State v. Lee*, 80 N. C.,

483). The court recalled Mr. Gilhooley to make clear what plaintiff's claims were. There was confusion on account of the conflicting claims of the parties. It had not been made clear to the court by plaintiffs' examination the kind of door that was closed; whether it closed straight, or whether it would go out beyond the line of the car and thus be more likely to strike a person. In view of the apparent claim of defendant developed on cross-examination, and the want of clearness left by plaintiff's examination the court considered further light essential. It was difficult for the court to form a proper view concerning the law to be charged.

Claims were made that it was the door and then there was the claim as to starting the car. It is to be noticed that counsel for plaintiff made both these claims, though not by his pleading.

The examination by the court discloses that the questions were not leading, and that they did not disclose any opinion of the court, or any prejudice against defendant's witnesses.

No objection or exception was made to any of the questions.

"An opinion has been expressed that the rule which requires a party to make objections and save his exceptions should not be applied when witnesses are being examined by the court. *State v. Marshall*, 105 Iowa, 38.

"In this we do not concur believing it to be the duty and right of counsel to courteously object and save his exceptions."

"Outside of the exception examination of witnesses by the court is subject to all rules of delivery and competency of evidence, and the same legal objections may, and should be interpreted as when conducted by counsel." (Ohio Civ. Tr., Section 567; *State v. Marshall*, 105 Iowa, 38; *People v. Lacoste*, 37 N. Y., 192.)

We think there was no error in the matter of questions and that they did not prejudice plaintiff; on the contrary, they benefited him more than harmed him.

The chief question before the court, however, which we desire to discuss is in respect to the refusal to admit in evidence certain parts of a city ordinance which were not allowed in evidence because the same had not been pleaded in the petition, and be-

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cause they were not entirely consistent with the theory of plaintiff's cause.

We do not wish to be guilty of insubordination. We recall the example of Joseph R. Swan in the famous slavery case when he followed the decision of the Supreme Court of the United States much against his will.

He remarked in that famous decision in substance: "Our Constitutions might as well be written in beds of sand if our courts do not follow the decisions of our superior tribunals."

We fully appreciate this duty and obligation; but we do not wish to be made a slave to judicial precedent according to the foot rule measure proposed by our good friend, the prolific counsel for Mr. Gilhooley. We want to be certain that all the squares and corners meet and dovetail with each other. We do not insist upon "blue bottle" case, but we do have great respect for the "rule of reason." Seriously, we are devoted in our ideals concerning "good old sound precedent." We yield loyal support to rules of "soundness and reason," which are as wholesome now as they were years ago. We heartily believe that if we would accurately and religiously follow the landmarks of pleading and that if we would not be misled by pleas of partisan advocates, or if we would not ourselves fall into loose habits we would come nearer the goal of perfect administration of justice.

Rules were made to obey and not to be disobeyed. Premium should be placed upon obedience rather than upon disobedience. Advocacy of rules from mercenary or utility standpoint is not as commendable as that which is supported by right and reason—for the sake of the law.

Rules of pleading being founded upon sound reason and justice, were made to follow, not to break. When once courts began to encourage and overlook breach of rules, the whole system is placed in jeopardy; we are then on the downward path. "Bound to follow judicial decision," counsel say! Yes! When it follows the rule and does not countenance breach thereof, we follow, not otherwise. If courts break fundamental rules or overlook breaches thereof this is not a mandate to continue their viola-

tions. But no court has ever held it to be error to uphold and enforce a long-time and unanimously supported rule of pleading.

For many years we have been an ardent supporter of the code system of pleading. It may be pardonable to state that twenty years of teaching would tend to place one in a rut of obedience rather than of disobedience to rules of pleading. Therefore, when it comes to actual enforcement, the impulse to do it strictly and rigidly is irresistible, the inclination being to scorn disobedience. The fundamentals of the English common law system as merged in the code were calculated to divest the subject of a cause of technicalities and to present a logical process of procedure, the object of which is truth and justice. It should be the aim of every person having to do with the administration of justice to fit himself by education so that he will not misuse it. It is an instrument of truth and justice, and not of chicanery and fraud. The code system is an accumulated system of wisdom and of years of experience, the rules and formulae devised after long experience being the best adapted to the purpose of arriving at certain and definite issues and arriving at a speedy and just decision. The rules are designed to facilitate the process of investigation of truth.

The action taken by the court in respect to admitting the ordinances under the pleadings, so strongly complained of by counsel, was in accord with the rule unanimously adopted and followed for many years. The only cloud upon its history consists of the isolated cases of disobedience by some trial courts, which may have been overlooked by appellate courts. Attention has been called to one such case, viz., *Columbus Railway & Light Company v. Schrock*, where an ordinance was admitted without having been pleaded. This case was reversed on the sole ground of error in the charge.

The overlooking of an established rule in such an instance can not be regarded as a precedent.

It has never been held in Ohio that it was prejudicial error to uphold and sustain a well settled rule that facts must be pleaded before they can be proved. Therefore, this court con-

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siders itself obedient to precedent, as well as to superior authority, since it has sustained the law by assessing the penalty upon the party who fails to comply with settled rules.

The case of *McDermott v. Mulligan* in the court of appeals involved precisely the same elements as did *Meek v. Penn Co.* The ordinance was competent evidence touching the negligence or contributory negligence of the plaintiff, Mulligan. With reference to this Judge Allread states:

“In addition to the rule of the common law the plaintiff’s duty may be measured by the ordinance and he was authorized to rely thereon. It can not, therefore, be said that his failure to look in the direction from which the defendant approached was, as a matter of law, contributory to negligence.”

Just as in the *Meek* case, the ordinance was competent as reflecting on the conduct of plaintiff. In those cases plaintiff was not relying solely on the ordinance, as here, as the gist of his cause, to fix the liability of defendant. Being competent touching the duty of plaintiff, it became competent for all purposes.

Courts of a municipality are bound to take judicial notice of the municipality’s ordinances without pleading them. *Ex parte Davis*, 115 Cal., 447; *People v. Quiver*, 172 Mich., 280; *Steiner v. State*, 78 Neb., 147; *Gallen Hall Company v. Atlantic City*, 76 N. J. L., 20; *Sivelsky v. Atlantic City*, 84 N. J. L., 198; *Buffalo v. Stevenson*, 145 App. Div., 117; 129 N. Y. S., 125; *Stutsman v. Cheyenne*, 18 Wyo., 499; *Houren v. Chicago, etc., R. R.*, 236 Ill., 620; 127 Am. St., 309.

So it is also held in some jurisdictions that where a case is triable *de novo* on appeal from a municipal court decision, the appellate court will pursue the same practice and will follow the same rules of taking judicial notice of the ordinances. Note Ann. Cases, 1914, C. P. 1233; *Steiner v. State*, 78 Neb., 147; *Gallen Hall Company v. Atlantic City*, *supra*; *Sidelsky v. Atlantic City*, *supra*.

But not all the courts adhere to this rule, some maintaining the general doctrine that ordinances even in appeal cases will

not be judicially noticed. (*Chicago v. Miller*, 146 Ill. App., 530; *Karchner v. State*, 61 Tex., C. P., 221.) In criminal cases on error courts invariably notice the municipal ordinances when they are not embraced in the bill of exceptions.

This is a mere suggestion that decision in *McDermott v. Mulligan* might have been based upon either of the foregoing rules.

Because of the disposition not to give effect to a sound and long settled rule we have taken the pains to carefully examine all the authorities, and state the rules supported by them.

It is an immemorial and universally accepted rule that courts of general jurisdiction do not take judicial notice of municipal ordinances that where a plaintiff relies upon the existence of an ordinance and acts or conducts in breach thereof as the gist of his complaint or as constituting part of his cause of action, the same must be specially pleaded as one of the facts upon which he relies, and that thereupon the same will be proven like other facts. The cases in support of this are collected in a note in 1914C. Annotated Cases, page 1232.

We justify the space of reprinting this collection of cases supporting a well settled, sound rule of pleading, on the ground that that there have been frequent cases of violation of well settled rules. So the following:

UNITED STATES—A municipal ordinance is not a public statute, but a mere municipal regulation, and to make it available in establishing a charge of negligence, it must be pleaded like any other fact of which judicial notice will not be taken. Here it was not pleaded and so could not be proven. *Robinson v. Denver City Tr. Co.*, 164 Fed., 174; 90 C. C. A., 160; *Choctow, etc., Company v. Hamilton*, 182 Fed., 117; *Garlich v. North P. Ry. Co.*, 131 Fed., 837; 67 C. C. A., 237.

ALABAMA—Courts of this state do not take judicial cognizance of municipal ordinances. *Ex Steam Laundry v. Lomas*, 166 Ala., 612; *Railroad v. Calderwood*, 89 Ala., 217; 18 Am. St., 105; *Clayton v. Martin*, 7 Ala. App., 190.

ARKANSAS—(Full recognition is given to the authority of those cases which hold that the courts do not take judicial notice of ordinances and that parol evidence is not admissible to prove an ordinance.) *City v. Cooper*, 108 Ark., 24 and 30.

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CALIFORNIA—Judicial notice will not be taken of a municipal ordinance showing authority for execution of tax deed without proof of ordinance. It is a general rule, supported by unbroken authority in this state, that courts of record do not take judicial notice of municipal ordinances. *Ex parte Davis*, 115 Cal., 447; *City v. Hevren*, 126 Cal., 229. (In this case we have no allegation as to the title nor the day of passage of the ordinance. The ordinance is not set forth nor the substance of it given; and therefore it is not sufficiently pleaded.) *Dillon on Mun. Cor.*, Section 346.

COLORADO—A municipal ordinance is not judicially noticed but must be established by proof. *Wolfe v. Abbott*, 54 Colo. App., 530. The courts will not judicially notice the provisions of a municipal ordinance. *Coors v. Brock*, 22 Colo. App., 470.

DISTRICT OF COLUMBIA—"Municipal ordinances are not laws of which judicial notice will be taken, but are facts, to be pleaded and proven. If not duly pleaded, they can not be proven. While some of the cases hold that ordinances must be set out *in haec verba*, we think the general rule to be that it is sufficient to set forth their provisions in substance. They must be carefully identified, however, that they may be found without difficulty." *District of Columbia v. Petty*, 37 App., 156, citing 28 Cyc. Law and Pro., page 393.

GEORGIA—Judicial cognizance does not extend to contents of municipal ordinance. *Dorsey v. State*, 7 Ga. App., 366; *McAlister v. State*, 7 Ga. All., 541. (Both criminal cases.)

ILLINOIS—On relying upon municipal ordinances in mandamus must allege and prove same as a fact, as courts do not take judicial notice of them. *People v. Busse*, 248 Ill., 11. Judicial notice not taken of offices established by ordinance. *Condon v. City*, 249 Ill., 596 (personal injury case); *Heidelberg Garden Co. v. People*, 124 Ill., 331, 337, holding it elementary that an ordinance must be pleaded before court can take judicial notice, and before it can be put in evidence. *Ill. Cen. Ry. v. Ashline*, 171 Ill., 315. An ordinance neither pleaded nor proved will not be considered. *Caradatos v. City*, 129 Ill. App., 471.

INDIANA—*Central Indiana R. Co. v. Wishard*, 104 N. E., 593.

KANSAS—"The court could not take judicial notice of the ordinances * * * and none was pleaded or proven. *Sullivan v. Darratt*, 83 Kan., 799.

LOUISIANA—Will not take judicial notice of ordinances. *State, ex rel, v. Mayor*, 139 La., 195; *Rudison v. Glover*, 131 La., 382; *Burke v. Iricalli*, 124 La., 774.

NEW YORK—*Milton S. & Co. v. Grigsby*, 199 N. Y., 577, affirming 132 App. Div., 584; *Grimmer v. Tenement, etc.*, 205 N. Y., 549; *People v. Ahern*, 124 App. Div., 840; *Collenden v. Reardon*, 138 App. Div., 738; *New York v. Seely, etc.*, 149 App. Div., 98; *Tucker v. O'Brien*, 117 N. Y. S., 1010; *Daly v. O'Brien*, 60 Misc., 423; *Sachs v. Lyon*, 53 Misc., 640; *Berry v. Urban, W., etc., Co.*, 148 N. Y. S., 67.

OKLAHOMA—*Cunningham v. Ponca City*, 27 Okla., 858.

VIRGINIA—*N. & P. Tr. Co. v. Forrest*, 109 Va., 658.

WISCONSIN—*State v. Koch*, 138 Wis., 27.

Action—False Imprisonment—"The ordinance was not mentioned in the pleading. * * * The obligations of courts are sufficiently burdensome when they are required to take cognizance of all acts creating and granting powers to municipal corporations. They have uniformly refused to take judicial notice of the acts and ordinances of such bodies except upon due proof. *And the introduction of such an ordinance in evidence, when not pleaded, against objections, is error.*" *Stittgen v. Rundle*, 99 Wis., 78.

WYOMING—*Stutsman v. Cheyenne*, 18 Wyo., 499.

It seems unpardonable to support such a fundamental and immemorial rule *en masse* by regiments and divisions in these days when reforms in opinions are being so strongly urged. But the Germanic form of attack seems the only way to convince and reform habitual breakers of rules.

Text-books uniformly announce and support the rule that courts will not take notice of city ordinances, stating that they must be pleaded and proved as facts. *Bliss Plg.*, Section 186; *Goodrich v. Brown*, 30 Iowa, 291; *Potter v. Waring*, 69 N. Y., 250; 12 Colo., 94; 41 Mich., 403; 17 Wis., 26; 8 Ia., 286; 56 Ind., 305; 23 Minn., 305; *Pomeroy Code Rem.*, page 684, note.

Maxwell Plg., page 89, states:

"Ordinances of a city or village must be pleaded as facts, and it is not sufficient to refer to them by the title and the date of its passage."

Phillips Plg., page 340, states:

"Courts, excepting those of the particular municipality, do

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not take judicial notice of municipal ordinances; and where such ordinance is relied upon, except in the municipal courts, it must be alleged and proved."

Booth on Street Railways, Section 259, on which work the writer spent about two years or so of his young life, states:

"Although a valid statute or ordinance limiting the rate of speed is admissible in evidence, its existence and violation should first be pleaded, and an averment that the car was running at a high rate of speed, contrary to law, or to the provisions of a statute or ordinance, is not an allegation of the existence of the ordinance."

Some years spent in digesting thousands of cases and writing upon the subjects of pleading and trial procedure, together with fully twenty years in law school teaching thereon, has somehow impressed the writer that it is a duty of courts to uphold and enforce well sanctioned rules. But some ten years of activity in judicial experience, however, has almost caused complete despair concerning the matter of proper and uniform enforcement of the rules of Pleading and Procedure. As the common law procedure degenerated into looseness and abuses, thus giving rise to the code system, so are the loose methods of the bar and bench now calling for reform either in the system or on the part of the bench and bar.

No one can successfully question the wisdom of the rule that courts shall not take judicial notice of municipal charters and ordinances. We no longer can look into our Revised Statutes to see what the fundamental law of the city of Columbus is. We must send our bailiffs to the city hall, where they may find an old dirty copy of the municipal charter laying around loose somewhere. We can never be certain of the municipal law of Columbus, except by calling the city clerk to bring into court a desired ordinance, and to have him specifically inform us whether a given ordinance is in force, and that it is the one applying to the case, and the only one on the subject.

The prime purpose and object of pleading being to definitely and certainly give notice to the adversary of the precise nature

and ground of a cause of action complained of, the force of the rule requiring a plaintiff to state with definiteness and precision the particular ordinance and section thereof in his petition, becomes readily apparent. Pleading the ordinance and the particular part thereof carries definite notice and knowledge to the defendant of the claim he is to meet. He is not then surprised at trial.

These fundamental rules have never been denied by any decision in the state. Their importance and necessity of strict compliance therewith is augmented by the decision in *Schell v. DuBois*, 94 O. S., 93, to the effect that violation of an ordinance is a *prima facie* act of negligence. Now more than ever is there urgent necessity for enforcing the rule.

We have stated that it has never been expressly decided in Ohio that it was error prejudicial to a plaintiff for a trial court to sustain an objection to the introduction of a municipal ordinance, when its breach is relied upon by plaintiff as the gist of his cause, and where the same has not been pleaded.

Counsel's complaint, leads us to remark that the question was not merely momentarily considered in Mr. Gilhooley's case. Our study of it was made annually for twenty years in teaching, as well as frequently in course of judicial duty. Our mind was so saturated with the rule requiring ordinances to be pleaded, that we momentarily went astray by denying admission of an ordinance in evidence offered by a defendant to show that a plaintiff had been guilty of negligence in failing to drive his team in accord with its provisions. In *Schasberger v. Columbus Railway & Light Company*, in this court, case No. 58452, the question of refusal to admit in evidence on behalf of defendant, was presented on motion for new trial, the verdict being set aside for error in refusing to admit the ordinance. We made the following statement in the opinion in that case:

"When the action is founded upon the ordinance or if the cause of action does spring from the violation of an ordinance, then its provisions must be set forth in the pleading by the plaintiff. *Judd v. Ry.*, 23 Mo. App., 56; *City v. Johnson*, 78 Mo., 661.

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But if the action is not founded upon the ordinance and the same furnishes no cause of action, it is the rule that it is not necessary to plead it. In such case the existence of the ordinance is merely a fact bearing upon the conduct of the party charged with negligence, and whether or not he was guilty of negligence depends upon the facts bearing upon his action. One of those facts may be the provisions of an ordinance which contains provisions as to the standard of duty required. *Robertson v. Ry.*, 84 Mo. App., 119; *Riley v. Ry.*, 18 Mo. App., 385.

This is precisely the doctrine of the Meek case, as we will show.

Attention has been directed to comment by Newman, J., in *Variety Iron Company v. Poak*, 89 O. S., 297, 309, of the decision in *Meek v. Pennsylvania*, 38 O. S., 632; also by Johnson, J., in *Schell v. DuBois*, 94 O. S., 93, 105. Newman, J., states that plaintiff (Meek) did not predicate his right of recovery upon the violation of the ordinance; that no reference was made to it in the petition, the charge being that the company carelessly, wrongfully and with gross negligence ran and moved its cars. Johnson, J., states: "No reference whatever was made to the ordinance in the petition."

It does not affirmatively appear in the report of the Meek case that no reference was made to the ordinance. The action being for death by wrongful act, and contributory negligence of the deceased being an issue, it clearly appears that Johnson, J., in the Meek case, justified reception of the ordinance as evidence on account of its relevancy to that issue. It does not expressly appear that defendant pleaded contributory negligence. On the contrary, the language of the court indicates that plaintiff's own evidence raised the issue. Attention is called to the fact that the deceased was injured while he was working on the railroad track; that he was charged with active duties for his own preservation, omission to perform which contributed to the injury.

"His action in going upon the track immediately preceding the injury, put in question his due exercise of care for his own safety. In such a case the burden is on the plaintiff to show that he exercised such care."

Johnson, J., then states that the deceased had the right to act upon the assumption that the railway company would conform to the requirements of the ordinance.

*"It was the duty of the deceased, if he went on defendant's track, to look out for approaching trains, and the violation of the ordinance by the railroad agent would not relieve him from that duty; but in the absence of apparent danger, the deceased may not have been guilty of contributory negligence, if he was lulled into security by knowing of the regulation prescribed by the ordinance and by assuming that the company would exercise such care. * * **

"This ordinance was admissible as reflecting upon the question of the care exercised by the deceased in view of the fact that the defendant was guilty of an act forbidden by an ordinance which he had no reason to anticipate."

Therefore correct analysis of the Meek case clearly differentiates it from the one at bar, and fully demonstrates that the court placed its conclusion upon the issue of contributory negligence raised on plaintiff's own evidence, the burden of disproving which was on him, which in the opinion of the court could be done by proof of the ordinance, and plaintiff's knowledge of its provisions and reliance upon compliance with its terms by the railroad company.

It is, therefore, fully demonstrated that the plaintiff was not founding his cause of action upon a violation of an ordinance, which is the attitude of plaintiff in the present case.

The rule is universal that when plaintiff relies upon the violation of an ordinance, as the gist of the cause of action, he must allege it in the petition and prove it as a fact.

But a defendant who relies upon compliance with the terms of an ordinance to show neglect of a plaintiff, need not plead it, because its provision and his conduct are mere facts which may be shown under a denial.

A decision that it is not prejudicial to a defendant to admit an ordinance in evidence, though not alleged in the petition, is not a conclusion that rejection of an ordinance offered by plaintiff, to prove part of his cause of action, because he did not plead

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the same, constitutes error prejudicial to the plaintiff against whom verdict is rendered.

It is significant that Johnson, J., gave this as the first consideration in holding it to be error in not admitting the evidence. It is significant that only secondary significance was given the ordinance as affecting defendant's negligence.

It has never been held prejudicial to plaintiff to reject an ordinance as evidence where it is relied upon to show negligence of a defendant, when plaintiff has failed to plead the same. Until it is held to be error prejudicial to plaintiff, to enforce him to comply with a rule of pleading, and until the settled rule of pleading has been expressly repudiated, it is the duty of the trial judge to enforce the same.

It seems unpardonable to have spent so much time on the question of admissibility of the ordinance. It would not have been done but for the injured attitude assumed by the counsel and knowledge of breaches of the rule.

It is unusual to give so much attention to a case so simple, with such little foundation, but counsel has seemed to take the matter so much to heart that the court thought it would endeavor to persuade him that it had done its duty. Lawyers owe serious duties to the profession, to the law, to the judiciary. Counsel surely understands his duty and obligations as a lawyer. He must know that he can not select the judge before whom his cases are to be tried or adopt indirect means designed to accomplish that purpose. It is more becoming to take the rulings, save the exceptions and pursue the remedies in a firm and independent attitude and test out the questions.

Motion for a new trial overruled; judgment of dismissal.

VALIDITY OF A BEAL LAW ELECTION.

Probate Court of Trumbull County.

IN RE CONTEST OF ELECTION, CITY OF NILES.*

Decided, 1917.

Elections—Laws to be Construed Liberally in Preserving the Will of the People—Beal Law Election Not Rendered Invalid by Being Held on the Day of a General Election.

A Beal law election is not rendered invalid by reason of being held on the day of the general election in November, where the electors were not deprived of an opportunity to express their will, and no irregularity occurred in the proceedings of council, and the electors had full notice of the time and purpose of such election.

A. J. Frieberg, R. N. Tusco, F. D. Templeton and U. C. DeFord, for wets.

G. P. Gillmer, T. I. Gillmer, W. F. MacQueen and Jos. Smith, for drys.

DILLEY, J.

November 15, 1917, John J. Savu filed a petition in this court alleging that he is a qualified elector of the city of Niles, Ohio, a municipal corporation; alleging further "that a pretended Beal law election was held in said municipal corporation on November 6, 1917, whereunder the question was submitted to the qualified electors of said municipal corporation whether the sale of intoxicating liquors as a beverage should be permitted within the limits of said municipal corporation;" further alleging that upon November 6, 1917, an election was held in said municipal corporation for the purpose of determining that question, and that said election was held on the same day as the regular election provided by law for the election of municipal officers; and that the time of said election was improperly desig-

*Affirmed by the Court of Appeals; opinion not reported.

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nated by the city council of said corporation, claiming that it should have been held as a special election on some day other than the general or regular election day and asks that said pretended election be set aside and held for naught.

On same day summons was issued to the sheriff of Trumbull county directing him to notify Charles Crow, mayor of said city of Niles, of the filing of the petition, directing him to appear on behalf of said municipal corporation on November 22, 1917, pursuant to law.

Upon November 20, 1917, the city of Niles, by its counsel, filed a motion in this court asking that the petitioner make his petition more definite and certain, alleging that "it is unable to tell whether it is claimed that the proper time had not elapsed, whether too much time had elapsed, whether it is claimed that the proper officials did not act, the action was not proper, or what is claimed."

November 22, 1917, both parties being present, motion was overruled, and on the same day by leave of court an amended petition was filed instantly by said petitioner alleging substantially the same facts as incorporated in the original petition with the additional allegation that a petition was filed under Section 6127, General Code, October 11, 1917, calling for a special election to determine whether intoxicating liquors should be prohibited in said corporation, and that at said election the majority of votes cast were in favor of the prohibition of the sale of intoxicating liquors as a beverage in said municipal corporation.

On the same day the city of Niles filed a demurrer to said amended petition, which was in words, to-wit: "Now comes the defendant, the city of Niles, and demurs to contestant's petition herein filed and says that the same does not recite facts sufficient to constitute a cause of action."

The matter then came on to be heard upon the demurrer, and upon arguments of counsel the matter was submitted to the court for consideration.

Section 6127, General Code, provides:

“When, in a municipal corporation divided into wards, qualified electors in a number equal to forty per cent. of the number of votes cast therein at the last preceding general election for state and county officers, or when, in any other municipal corporation, qualified electors equal to forty per cent. of the votes cast therein at the last preceding general election for municipal officers, petition the council thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such municipal corporation, such council shall order a special election to be held at the usual place or places for holding elections therein not less than twenty days nor more than thirty days from the filing of such petition with the mayor of such municipal corporation, or from the presentation of such petition to the council thereof. Thereupon, such petition shall be filed as a public document with the clerk of such municipal corporation and preserved for reference and inspection.”

Upon reference to the amended petition, it would seem that there was just one question contended for on part of contestant, and that a question of law as to whether or not the day designated by the city council, being November 6, 1917, and being the same day on which was held the general and regular election for the election of municipal officers, was legally so designated in that under the law it is a special election, and whether the vote thus cast on said day was a legal act and should be sustained by the court or whether it should be declared illegal and held for naught.

Where the Constitution or the act of the Legislature fixes the time for an election, there can be no room for doubt as to that time—that is a mandatory provision. But where by act of the law it limits the time within which an order is to be executed, it is directory. As held in *Dayton Petition for Election*, 2 N.P. (N.S.), 245, reading from the syllabus, the court holds:

“The provisions of Section 1 of the Brannock law (97 O. L., 87), limiting the time to not less than twenty and not more than thirty days within which the mayor or a common pleas judge shall order a special election upon the filing of a petition for such election as therein provided, is directory and not mandatory.”

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Under Section 6127, General Code, which governs a special election, as in this case, providing that the time of the special election be fixed by the city council within a certain period and no time mentioned when the council should fix the date, it was directory only and lay within the discretionary power of said council as to the time when, within such statutory period, said election was to be held. And did they fix the time not less than twenty nor more than thirty days for holding the special election; and in the absence of any mandatory provision to the contrary, is the act of the city council in fixing the sixth day of November for holding the special election, being the same day on which the general and regular election was held, contrary to law?

It might be observed that there is no contention on the part of the contestant that the council in fixing November 6, 1917, as the time for holding said special election did not fix the time as the law provides, not less than twenty days nor more than thirty days from the filing of the petition with the mayor or presentation of the same to the city council. But it is contended by counsel for petitioner, that it was not the legislative intent that a special election such as this one should be held and so designated by the city council for the time of holding said special election upon a regular or general election day, for the reason that the interests of all parties upon the question to be submitted should not be entangled or perhaps confused with other issues to be voted upon that day. And it is contended by counsel for the city that though it is a special election that it was within the right of the council to thus fix the day upon the regular and general election day, contending further that a greater number of electors would respond to their right of franchise upon that day and thereby receive a greater expression of the will of the people.

The court is without much aid from any decisions as laid down by the courts in this or other states adjudicating this specific question. But it is not without some authority, by implication, tending to throw light upon this question.

In *State v. Superior Court*, 71 Wash., 484, the court, in passing upon the question of a special election to fill vacancy in office, says:

“Providing that special elections are such as are held to supply vacancies in office, an election to fill the vacancy on the district bench is a special election though held on the same day as the general election.”

And again, as recited in *State v. Kehoe*, 49 Mont., 582, the court says:

“An election to fill a vacancy, though held at the same time as the general election, being a special election.”

And again there is some aid furnished the court in the opinion of Timothy S. Hogan, Attorney-General of this state, in construing the laws as to whether “a special election upon the subject of issuing bonds” held at the primaries would be legal; quoting from his opinion as found in 2 Atty. Gen’s. Rep., 1255, he says:

“I find that my predecessor, Hon. U. G. Denman, rendered an opinion to the effect that a special election upon the subject of issuing bonds for the construction of a school building might lawfully be submitted at the date of the primaries, although many inconveniences of such a proceeding were pointed out by him. In his reasoning I concur in spite of the additional point which you suggest in your letter, and which does not appear to have been considered by Mr. Denman.”

While, as stated, there is no specific finding which the court after much research is able to find wherein the court specifically held that a special election such as this one held upon the same day as the regular election is a valid election, neither am I able to know of any decision which says that it is illegal. But I am able to find in the cases recited that the courts by implication and in words say that “an election to fill vacancies in office, though held upon general election day is still a special election.” And the fair inference—in that the courts have not determined that a special election could not be held on that day, but says that it is a special election if it is held upon that day—is that in the mind of the court, if the election is so held, it would be valid.

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But there is a rule of law, I take it, that is well settled as laid down in the case of *Fike v. State*, 4 C.C.(N.S.), 81, where the court passing upon an election under the Beal law, reading from the syllabus, says:

“Election laws are to be construed liberally so as to preserve if possible and not defeat the choice of the people at the election.”

But assuming, as alleged in the petition, “that the city council improperly designated the date of the regular election for the holding of the special election,” in the absence of any mandatory provision to the contrary and in view of the city council’s discretionary power, could it be said to be more, if at all, than an irregularity?

Based upon this proposition, the court is then confronted with much authority throughout the states that holds irregularities in the conduct of an election which do not affect the results are not ground for declaring an election void.

“It is the policy of the law to uphold elections for the purpose of advancing educational interest and not to annul them for trivial causes; and mere irregularities in the conduct of an election, which do not deprive the citizens of a full and fair opportunity of voting are not sufficient to annul the election.” *Taylor v. Sparks* (Ky.), 118 S. W., 970.

And again in *Fuerst v. Summler*, 28 N. Dak., 411, reading from the second paragraph of syllabus, the court says:

“Irregularities in the conduct of an election by election officers over whom an elector has no control will not ordinarily vitiate the vote of such election, where it appears that he had no knowledge of such irregularity and voted in good faith, and especially it is true as in this case where no fraud is shown or alleged and there appears to have been a full, free and fair expression of the will of the electors.”

The vital question in all cases of election is whether the great body of electors have had full and fair opportunity to express

their choice. This rule is laid down in *State v. Superior Court, supra*.

"This is the real test moving all courts in holding that unless the contrary appears, mere irregularities should not be held to defeat and set aside the popular will."

And, again, reading from the same opinion, the court says:

"This is clearly pointed out in *State v. Doherty*, 16 Wash., 382, where it is said, 'the rule established by an almost unbroken current of authority is that the particular form and manner pointed out by the statute for giving notice is not essential, and where the great body of the electors have actual notice of the time and place of holding the election and the questions submitted, this is sufficient. The vital and essential question in all cases is whether the want of the statutory notice has resulted in depriving sufficient of the electors of the opportunity to exercise their franchise to change the result of the election.' The same rule is announced in *Murphy v. Spokane*, 64 Wash., 681, where it is said: 'The purpose of an election, whether for men or for measures, such as this one before us, is to give effect to the voice of the people, and when the people have spoken their verdict should not be disturbed by the courts nor the election in which they voiced it held void, unless it is clearly so.' "

And again it is stated:

"Whether statutes relating to the time and place of elections are to be construed mandatory or directory, a departure therefrom will invalidate the election only when it makes it impossible or very difficult to determine whether fraud was committed or anything done which would affect the result." *Chenoweth v. Earhart*, 14 Ariz., 278.

In view of the fact that there is no allegation made in the petition filed by contestant but what all the acts of the city council up to the time they fixed the day for holding this special election were entirely in conformity to law and without fraud or irregularity, in the absence thereof and in view of the law heretofore cited, the court is of the opinion that the city council in fixing the sixth day of November for holding the special election upon the general and regular election day came within their

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discretionary powers. And in that there is no allegation in the petition that the electors did not have full and fair opportunity to express their wish, no allegation that the electors were deprived of the opportunity to express their right of franchise sufficient to change the result of the election, the voice of the people having spoken, it would seem to be the duty of the court to give effect to that voice, and not within the purview of the court to disturb that choice.

The demurrer is sustained.

AWARD OF WORKMEN'S COMPENSATION.

Common Pleas Court of Montgomery County.

JOSEPHINE MITCHELL v. INDUSTRIAL COMMISSION OF OHIO.

Decided, April 4, 1918.

Appeal from Allowance of Claim by Industrial Commission—Question of Sole Dependency—Was Death Due to the Blow Received—Tuberculosis as a Result of an Injury.

1. Where the testimony is to the effect that during the lifetime of the decedent he was the sole support of the claimant, who was in a crippled condition and without an estate of her own, the fact that she had children who might have assisted her but did not do so, is not sufficient to defeat her claim.
2. Death will be held to have resulted from an injury received during the course of employment, where it is shown that the emaciation and debility which resulted from the injury subjected the decedent to and greatly accelerated the disease from which he died.

Charles H. Kumler and Charles W. Folkerth, for plaintiff.

Harry F. Nolan, Assistant Prosecutor, and Stanley McCall, Assistant Attorney-General, contra.

SNEDIKER, J.

This case is on appeal from the Industrial Commission of Ohio denying the claim of the plaintiff as an alleged sole dependent of the decedent, Oliver B. Mitchell. The plaintiff's right to compensation is resisted by the defendant on two principal grounds. The Industrial Commission contends:

First. That the plaintiff was not solely dependent on Oliver B. Mitchell.

Second. That the death of Oliver B. Mitchell was not caused by an injury sustained in the course of his employment.

It is not necessary for us to here re-recite the evidence, with all of which counsel for both parties are familiar, and part of which, the testimony of the physician, has been transcribed and is before the court.

As to the first ground on which the Industrial Commission resists the claim, we are of the opinion that the testimony was ample to show that this plaintiff, during Mitchell's life and prior to his injury, was dependent solely upon him for support. She herself is a weakened cripple and unable, by reason of her lack of an estate and her physical disability to make provision for herself; and the evidence shows that other children of the plaintiff, instead of contributing, were largely a burden, and that the decedent made provision for his family as it existed. We do not understand that the fact that some of the children might have provided for their mother enters into the discussion. The question is: Did they do so, or did Mitchell, the decedent, make the entire provision for the sustenance and maintenance of the plaintiff?

In so far as this point of contention is concerned, our finding is for the plaintiff.

As to the second claim of the Industrial Commission, that the death of Oliver B. Mitchell was not caused by an injury sustained in the course of his employment, we have some difficulty. There is a conflict of testimony as between the physicians in the case—we may say the usual conflict which arises from such testimony coming from opposite sides. But, taken as a whole, it

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indicates to us that the death of Mitchell not only might have been but was caused by the blow which he received and which constituted his accident.

It appears that after the decedent was injured he fell into an extreme state of weakness and emaciation as the result of such injury; that he was injured and as a result thereof he became emaciated and weak, whereas before he was strong, vigorous and healthy, the evidence is clear; that after becoming so emaciated and weak, symptoms of tuberculosis appeared in him there is no doubt. From tuberculosis he died. The evidence of the physicians is to the effect that tuberculosis is produced by a germ, which finds lodgment in impaired tissue. Whether the germ located itself in Mitchell before or after the injury there is and can be no direct proof; but the fact that he was vigorous before gives us license to entertain the opinion that if such germ did find lodgment before, the field for its growth and operation was not present; the tissues were sound. The proof being that he was healthy before the accident, we may presume that Mitchell continued so to the time when the contrary is shown. That time was after the accident. Wasting and emaciation were its consequences; resistance was gone. Then the disease, the germ, became virulent and active; tuberculosis resulted. In other words, but for the presence of the fertile soil of depreciated tissue, caused by his injury during his employment, the growth of the disease which produced Mitchell's death would not have been made possible. It was the growth of the disease which killed him. The accident caused the condition that made that growth possible, or accelerated it to an extent that led to death, and his death is chargeable thereto. There is no evidence in the case other than the accident, the blow, and its resulting conditions, from which it can be claimed that the breaking down of the tissues and of the organs of Mitchell's body were brought about. If we travel back from the germ to depreciated tissue and through the emaciated, weakened physical condition to the blow, and find the decedent prior to that blow a vigorous and healthy man, we have reason at least to say that the growth and acceleration of the disease may be charged to the blow.

If we may reasonably say this, what is the law? It is an old principle that the acceleration of death causes death, according to both the civil and criminal law. 201 N. Y. Rep., p. 221.

Or, as stated by Honnold on Workmen's Compensation, at Section 133:

"Where, but for the accident, the person would not have died at the time at which and in the way in which he did die, the accident must be held to have been the cause of his death."

Dr. Peters, in his testimony, in response to a question by Mr. McCall, said:

"Q. Would the condition that Mr. Kumler has described Mitchell as being in break the barrier? A. No, it would not break the barrier. It might cause his death indirectly after the disease of tuberculosis has started; it might turn the tide against him, but would not break the barrier."

In a subsequent answer, he said:

"A. But I will stick to the point that debilitation can not start the disease, but it could turn the tide."

And in another answer:

"A. If he had it, it might have turned the tide against him."

Irrespective of the testimony of the other physicians, this evidence, which is relied upon by the Commission for its defense, indicates that the existence of the emaciation and debilitation of Mitchell aggravated and accelerated his disease and hastened his death; and such emaciation and debilitation being fairly established to have resulted from the blow which he received and which produced in him what is known as *posterior myelitis*, our opinion is that, under the rule already stated, a liability ought to arise in favor of this plaintiff on account thereof, and that she is entitled to compensation under the act. The computation of such compensation, as well as the fixing of attorney's fees, is left for the final entry.

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**RECOVERIES UNDER THE FEDERAL EMPLOYERS'
LIABILITY ACT.**

Common Pleas Court of Lucas County.

JEANNETTE CONNORS, ADMINISTRATRIX, v. NEW YORK CENTRAL
RAILROAD COMPANY.

Decided, April Term, 1918.

*Railways—Recovery by Representative of Employee Injured in Inter-
state Traffic—Barred where Settlement Was Made with Such Em-
ployee in His Life Time.*

Satisfaction by settlement or otherwise of a pending action for personal
injuries operates as a bar to an action by the personal representa-
tive under the federal employers' liability act, brought after the
death of such employee.

BROUGH, J.

The demurrer which has been filed by the plaintiff in this
cause to the second defense in the answer raises the question
whether the personal representative of a deceased employee of
a railroad company, engaged in interstate commerce, may main-
tain an action for the benefit of the father and mother of the de-
ceased when the employee himself has—after action brought by
him personally—been fully compensated by a settlement of his
claim for the injuries suffered by him.

The decision of this question requires a construction of the
federal employers' liability act as amended by the addition of
Section 9 thereto on April 5, 1910. The question has never been
decided by the federal courts. It was specially reserved for
future decision by the Supreme Court in the case of *St. Louis &
Iron Mountain Ry. v. Crafts*, 237 U. S., 648.

In the case of *Thomas v. Chicago & N. W. Ry.*, 202 Fed., 766,
it is assumed in the syllabus of the case, but without further
reference thereto, that such an action can not be maintained.

Section 1 of the employers' liability act provides that the
interstate carrier shall be liable in damages to *any person* suffer-

ing injury while employed by such carrier in such commerce; *or*, in case of death of such employee, to his or her personal representative for the benefit of the persons named and in the order named in the statute.

Two separate and distinct actions are thus provided for by this section, but the second—the one in favor of the personal representative—is only in the alternative.

Before the addition of Section 9 of the act, in 1910, the first action did not survive the death of the injured employee.

Since the addition of that section the action does survive to the personal representative, and for the benefit of the persons named in the first section, and in the order named; but the new section expressly states that: “in such cases there shall be only one recovery for the same injury.”

The contention is made that while there was only one accident resulting in physical injury to the employee—two separate and distinct injuries resulted therefrom, one to the employee himself and the other to the dependents of the employee, or to those named in the statute and who might reasonably expect to reap a benefit from his labor had he continued to live. And the contention is made that a settlement or satisfaction of one of these injuries is not a bar to the prosecution of an action to recover the damages suffered by reason of the other.

In view of the language of the act itself—that the interstate carrier is liable either to the injured employee, *or*, in case of his death, to his representative—this contention is not tenable. In my opinion Congress never intended that both the employee and his personal representative should recover.

This is, I think, emphasized in the later provision of the act by the language: “in such cases there shall be only one recovery for the same injury.” Nor does the fact that the section referred to provides that the action in favor of the injured employee shall survive alter the situation.

It was evidently the intention of Congress that all of the damages suffered by reason of the negligent act of the carrier should be compensated for, whether suffered by the employee or by the persons named in the statute, but in one action; but it was cer-

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tainly not the intention that there should be a double recovery, for it is very evident that when the action instituted by the employee survives to his personal representative, the damages he may recover by reason of the survival of the action are limited to the mental pain and suffering of the employee caused by the injury and suffered by him up to the time of his death.

All other damages that may be recovered are such as have been suffered by those for whose benefit the action is brought, and are limited to the pecuniary loss suffered by them by reason of the death of the employee.

Where the former action does not survive, however, by reason of the fact that the employee has prosecuted it to a final determination or settlement, and the employee has been fully compensated before his death, no cause of action exists in favor of the personal representative; for the carrier, having been "liable in damages" either "to the person suffering injury * * * or * * * to his or her personal representative for the benefit" of the persons named in the statute, and having compensated the person suffering the injury, certainly can not again be held "liable in damages" to persons who are only named in the statute in the alternative.

The case at bar furnishes a fair example of what would otherwise occur under the circumstances. The employee was fully compensated for what he claimed in his petition were injuries resulting in his *total disability* and which wholly and *permanently incapacitated him from performing manual labor*.

To permit him to recover compensation on account of total disability of a permanent nature, and after he has done so then permit the personal representative to recover on behalf of those named in the statute "such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee" (*American R. Co. v. Didrickson*, 227 U. S., 145) would violate one of the fundamental principles of the law of damages; and to so construe an act of Congress as to obtain this result would equally violate one of the fundamental principles of statutory construction.

That the estate of the injured employee, augmented by the compensation received by him for his injuries, would, if the employee should die intestate, under the statute, go to the brothers and sisters, and not to the father and mother for whose benefit the action is brought, is not material.

If the employee has been fully compensated, the liability of the carrier has terminated, and the employee having been placed—from a pecuniary standpoint—in the same position he would have been in had he never been injured, the persons who might reasonably expect any pecuniary benefits from the results of his future labor must, under the circumstances, necessarily look to him for their protection.

For these reasons the demurrer is overruled, and exception of plaintiff noted.

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**EXEMPTION LAWS NOT DEFEATED BY WAIVER OF
THEIR PROVISIONS.**

Common Pleas Court of Hamilton County.

WILLIAM A. RINCKHOFF V. AMELIA M. BULLER ET AL.

Decided, June, 1918.

*Agreement Waiving Exemption Laws—Embodied in a Promissory Note
—Judgment Taken on the Note—But Homestead Exemption is
Claimed by the Maker and Allowed.*

An agreement whereby a debtor waives "the benefit of all laws exempting real or personal property from levy or sale or of any law intended for advantage or protection," is contrary to public policy and can not be made the basis for sustaining an execution against property of the debtor otherwise covered by the exemption laws.

W. A. Rinckhoff, for plaintiff.

Jos. B. Derbes and Ed. H. Jones, contra.

NIPPERT, J.

Plaintiff is the owner of a certain note signed by the defendant, Amelia M. Buller, of which the following is a copy:

"\$400.00

CINTI., OHIO, Mar. 15th, 1916.

"Thirty days after date for value received, I promise to pay to H. E. Gill or order, the sum of four hundred dollars, with interest thereon from date, until paid, at the rate of 6 per cent. per annum, payable ———, with exchange at the current rate, and with costs of collection and an attorney's fee, in case payment shall not be made at maturity.

"I hereby waive the benefit of all laws exempting real or personal property from levy and sale or of any law intended for advantage or protection.

"And I do hereby authorize any attorney at law to appear for me in an action on the above note, at any time after said note becomes due, in any court of record, in or of the state of Ohio, to waive the issuing and service of process against me, and confess a judgment in favor of the legal holder of the above against me, for the amount that may then be due thereon, with interest at the rate therein mentioned, and costs of suit; and to waive and release all errors in said proceedings, petitions in error, and the right of appeal from the judgment rendered.

"(Signed) AMELIA M. BULLER."

Eight cents in United States Internal Revenue Stamps canceled.

Endorsements:

"H. E. GILL."

During the April term, 1917, plaintiff recovered judgment upon the said note. Before execution was issued, Amelia Buller took advantage of the bankruptcy act and was adjudged a voluntary bankrupt in the federal court of this district. The plaintiff, attempting to collect on his judgment, secured in the common pleas court, was met by defendant's affidavit in support of her claim for homestead exemption.

The question arises now, whether, under the terms and conditions of said note, the defendant has waived all her rights for homestead exemption under the statutes of our state, thus giving plaintiff the right to collect his judgment on defendant's property, which otherwise would have been exempt from execution.

The court has been unable to find any reported case covering this particular point in Ohio, but similar questions under similar statutes have been passed upon frequently in other states.

Section 11725 of the General Code provides as follows:

"Every person, who has a family, and every widow, may hold property exempt from execution, attachment or sale, for debt, damage, fine or amercement, as follows:"

The statute then enumerates various items or amounts of money in lieu thereof which such person may claim exempt from execution.

And Section 11730 provides that:

"Husband and wife living together, * * * may hold exempt from sale on judgment or order, a family homestead not exceeding one thousand dollars in value. The husband, or in case of his failure or refusal, the wife may make the demand therefor; but neither can be allowed such demand, if the other has a homestead. In case of assignment, for the benefit of creditors, upon filing the written consent of husband and wife to the sale of homestead property exempt by law, such homestead may be sold subject to the dower and homestead right herein provided."

But Section 11729, provides that the right to homestead exemption,

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“shall not extend to a judgment rendered on a mortgage executed by a debtor and his wife, nor to a claim for manual work or labor, less than one hundred dollars, nor to impair the lien by mortgage or otherwise, of the vendor for the purchase money of the premises in question, nor the lien of a mechanic, or other person, under a statute of this state, for materials furnished or labor performed in the erection of the dwelling-house thereon, nor for the payment of taxes due thereon.”

In the case at bar, Mrs. Buller attempted, in her note of March 15, 1916, to waive the benefit of all laws exempting real or personal property from levy and sale or of any law intended for advantage or protection.

Since plaintiff's claim on the promissory note of Mrs. Buller does not fall within any of the specific classes of cases set out in Section 11729, the question to be determined is, whether the homestead right of Mrs. Buller is barred under the express provisions of the statute.

There being no decisions in point to be found among the reported cases of our state, we are forced to look to other states where this question has been decided by the courts of last resort. There is none which is more concise upon this subject than the case of *Curtis v. O'Brien*, 20 Iowa, 376, where the court in a short but clear opinion lays down the principle that—

“A waiver of exemption laws, contained in a note, will not, when a judgment is obtained on such note, entitle the plaintiff to have his execution levied upon property exempt from execution by the general law of the state.”

The court, commenting upon this principle, says:

“The justice, wisdom, propriety and sound policy of exemption laws are as well recognized, and these laws are as fully the settled policy of the state as the exemption from imprisonment for debt. * * * The statute itself has provided for the execution of valid mortgages, without limit as to the property mortgaged.”

The court does not look with favor upon parties to a contract inserting or attaching conditions thereto which would defeat the statute or render nugatory its most beneficent expressions

or provisions. That such an agreement is contrary to public policy and will not be enforced has been the law in the state of Iowa since that question was first raised in that state in 1866.

It is also the law in Kentucky as laid down in *Moxley v. Ragan*, 10 Bush., 156, where the court held:

“An executory contract by which a debtor agrees to waive all benefits under the exemption laws is against public policy, like agreements to waive the benefit of the bankrupt act or statute of limitations, and can not be enforced. The recitals in such agreements can not constitute an estoppel.”

The same principle has been laid down by the Supreme Court of Missouri in the case of *Meyer Bros. Drug Co. v. Bybee*, 179 Mo., 355, where the court say:

“The purpose of the homestead law is to protect the wife and children and other members of the homesteader’s family, and not the father or husband alone, and he can not, by a simple declaration, either in writing or otherwise, made at the time the debt was contracted, render nugatory that law. * * * That the homestead exemption was founded upon principles of the soundest policy can not be questioned. Its design was not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals those feelings of sublime independence which are essential to the maintenance of free institutions.”

The Supreme Court of the state of Florida, in the case of *Carter’s Admrs. v. Carter*, 20 Fla., 558, laid down the same doctrine clearly and forcibly.

The state of Pennsylvania is the only state where there appears to be a leaning in favor of the creditor in the interpretation of a contract similar to the one at bar.

In the state of New York, in the leading case of *Kneetle v. Newcomb*, 22 New York, 250, the rule which we are following here was clearly announced in the following language:

“A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intentions of the Legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of

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the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and he believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution in case of non-payment. It was against the consequences of this over-confidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the Legislature has undertaken to interpose."

So, in the case at bar, Mrs. Buller, being a married woman and having a right under Section 11730 to claim a homestead exemption, except as limited by Section 11729, the law will not permit her to enlarge upon that which the statute has decreed should be the rule.

In view of these decisions and many others, too numerous to mention, the plaintiff can not proceed to collect his judgment in this action against the defendant, Amelia M. Buller.

APPLICATION OF THE RULE OF SPEED OF MOTOR VEHICLES.

Common Pleas Court of Franklin County.

EDWARD C. GILLILAN, BY NEXT FRIEND, v. ALBERT SPRING.

Decided, May, 1918.

Determination as to the Character of the Locality in which a Motor Vehicle Was in Collision—Judicial Functions and Those Belonging to the Jury—Charge of Court with Reference to Application of the Speed Law.

1. "The business and closely built up portions of a municipality," within which it is forbidden by Section 12604, G. C., to operate a motor vehicle at a speed greater than eight miles an hour, are those portions of a city contiguous to a public highway which are closely built up with structures devoted to business.
2. Where the evidence as to the nature and character of the part of a city, in which an automobile collided with another vehicle, makes it clear and beyond dispute that it is not a business and closely built up section, it is the duty of the trial judge in an action growing out of the accident to apply the law and instruct the jury

that the case is governed by the provision of the statute which fixes the maximum speed of an automobile at fifteen miles an hour.

F. S. Monnett, for plaintiff.

M. E. Thraikill, contra.

KINKEAD, J.

This action was for a personal injury suffered by plaintiff, a boy aged ten, riding a bicycle, by collision with an automobile being driven by defendant. The charge was that the automobile was being driven at a speed in excess of fifteen miles per hour. The question concerning which we express the view taken in submitting the case to the jury is as to the rule of speed.

The character of territory of the city where the accident occurred was not business and closely built up portions of the city. West Broad street, bounded on the north by the State Hospital Grounds, and one business place occupied by two stores, the rest on the south side of the street being residences with one parochial school.

It was stated in the charge that:

"The statutes provide that a motor vehicle shall not be run at a greater speed than eight miles per hour in the business and closely built up portion of a municipality. This means that the territory where automobiles are limited to eight miles per hour must be closely built up with business houses. It does not have application to such territory, as is disclosed by the evidence, where there is one business building containing two business places, the remaining territory being built up closely with residences, a school building and a state hospital. The business houses must be occupied as places of business operated by persons who are carrying on a trade and employment for the accommodation and service of the general public.

"Under the evidence in this case where facts concerning the territory are not controverted the court instructs the jury that the defendant was required to drive his car at a speed not exceeding fifteen miles per hour."

This is claimed to be error, it being contended that the question of speed under the evidence should be submitted to the jury.

The function of court and jury is elementary and familiar. The duty and power of a jury is to decide disputed claims. When the facts are in dispute or controverted the function of

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the jury is to deduce from the conflicting testimony, and from that accepted as evidence, the ultimate facts as to how the transaction occurred or took place.

Instructions to the jury are to be given when the claims and testimony are in conflict or dispute, or, as is usually stated, when the facts are in dispute.

When there is no conflict in testimony, or in the evidence; when the facts are not controverted, when they are disclosed by the evidence to be a given state of facts not in dispute, then nothing remains but for the court to apply the law. This is the function of the court, not of the jury. It should be just as appropriate to state that the jury should not be substituted for the court, as to say that the "court should not be substituted for the jury."

"More liberal and indefinite expressions have been made since the recent criticism and indictment of courts, viz.: What is ordinary care, what is reasonable safety, and the like, are in the first instance, usually, questions for the determination of the jury under all the evidence and proper instructions," etc. 88 O. S., 34. There must be no "sinister and indirect invasion and usurpation of the right of trial by jury." *Id.*, 43. "Ordinarily, the question of negligence, if not one of fact, is of mixed law and fact, and is a proper issue for the determination of the jury. If negligence raised a proper issue for * * * the jury, certainly contributory negligence must likewise raise a proper issue for the determination of the," etc. *Id.*, p. 44.

The right, power and duty of trial courts should be equally as sacred and secure as, "The right of trial by jury should be * * * inviolate in the working of our courts, as it is in the Constitution." Gibbs case, 88 O. S., 34, 47.

It was for the jury to decide in the light of all the facts whether it was negligence, etc., or "the issue on that question as made by the pleadings was one of fact to be determined by the jury from all the evidence under proper instructions," etc., "whether or not plaintiff exercised ordinary care and caution in crossing the tracks was a question for the jury under proper instructions" (93 O. S., 127), are common present day expressions, and have a tendency to endanger the judicial function in the working of trial courts.

"The judicial tendency is toward looseness of either conception or expression. * * * Judges and courts are too often satisfied with the statement that a question is peculiarly one for the jury, without observing and applying the settled rules which mark the line between the province of the court and jury. There is apprehension lest the trend of the times has something to do with it." Ohio Civ. Trials, Section 632.

The true conception appears to be that:

"If the facts are not disputed * * * and there is but one inference to be drawn, to which the law is to be applied, non-suit may be entered. To state that a question is for the jury, without inference to the rules governing the matter, is meaningless." *Id.*, Section 632.

There are defined rules governing submission of questions to the jury; where there is any evidence that tends to prove, etc.; where facts are of doubtful meaning, and ordinary candid and intelligent men may arrive at different conclusions, or where the facts, though undisputed, are such concerning which reasonable minds might reach different conclusions. When facts are undisputed, and but one rational conclusion can be deduced, it is a question of law for the court; if from the undisputed facts and circumstances the inferences to be drawn are reasonably clear and natural, or fairly inferable and not equivocal, and can lead to but one conclusion, it becomes a question of law for the court. Ohio Civ. Tr., Sections 632, 633, and cases.

Does it not seem plain that there is seldom room for controversy concerning the character of a portion of a municipality in such cases as the one at bar. When the undisputed facts presented by all the evidence do not disclose the locality of a municipality to be a business and closely built up portion thereof, must the question nevertheless be submitted to the jury and, for example, permit all kinds of arguments and contentions concerning the law to be made to the jury? Counsel for plaintiff would have had the locality here involved a business and closely built up portion; arguments would have been made to the jury concerning the business at the asylum, the traffic to and from the same on all occasions, except at the date of this accident when the street was clear.

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The business and closely built up portions of a municipality means that portion of a city contiguous to a public highway, where the locality is built up with structures devoted to business. This is not restricted to what might be considered the main business and closely built up part of a city, but is to be applied to different portions which may be devoted to business being closely built up with business, though to a more limited extent.

Closely built up, qualifies and refers to business portions. "Closely built up" means "portions" of a city where places of business are brought together in a close manner or state, where places or buildings devoted to business come together. This seems to be the common grammatical construction of the statute. It is not necessary to prescribe how much business is done, how great or how small, or how large or small may be the numbers of the buildings.

The statute is not designed to apply to closely built up portions of a city devoted exclusively to residential purposes.

The design of the statute is to guard and protect people thus brought together at such business portions of a city by requiring them to slacken their speed. A motor vehicle operator is bound to observe the character of the locality and comply with the law (32 R. I., 490). Any motor traveler having ordinary powers of observation can tell when he is in the residential localities, and when he has arrived at a business and closely built up portion of a city.

State v. Born, 85 O. S., 430, is generally cited as an authority in civil cases of this class. It is stated in the opinion that whether a locality is a business or closely built up portion of a municipality or otherwise is a question of fact to be determined by the jury.

This is not a pertinent decision because the question actually therein considered was whether a city ordinance might declare the locality, where the automobile causing the death was driven, was a business and closely built up portion of the city. The question decided was that the ordinance was properly excluded. The reason assigned was that defendant had the right to have the fact determined by the jury upon evidence, and not by the declaration by the city council; that is the fact whether the place in-

volved was within such a district as is described by Section 12608 was to be determined upon the evidence rather than by the mere declaration of a municipal ordinance.

The point of the decision was that a city ordinance could not be substituted for evidence as proof of the locality.

No decision whatever was made in that case in respect to the determination of the character of a locality, when the undisputed evidence discloses that it is not a business and closely built up section of a city.

Counsel for plaintiff has suggested in other cases of non-suit now under consideration that the court necessarily weighed evidence in order to determine whether there was *any* evidence that *tended* to prove facts essential to maintain a cause.

The same process of reasoning is involved when applying the appropriate rule of law to single state of facts, where other issues are submitted for decision by a jury.

It has been stated that for a judge to rule on what is or is not rationally possible for a jury to do, is, in reality, ruling on matter of law. In other words, whether there is *any evidence* upon which the jury could *reasonably* determine as to the truth of a matter in issue is a question of law for the court; if there is, it must be left to it for decision. Ohio Civ. Trials, Section 696, p. 588. This view concerning the scintilla rule does not find favor with us. The judicial function in ruling as matter of law whether there is any evidence in proof of any material facts is not to be exercised by a consideration whether a jury could reasonably determine the truth. Such a process involves the probative value or weight of the evidence, making it necessary to decide whether a jury could justifiably find a verdict.

It is not difficult to decide when there is *no* evidence; so it is simple to determine whether there is *some* evidence *tending* to prove an issue. (Ohio Civ. Tr., Section 697.)

These views and general considerations are mentioned to illustrate a trend to yield a judicial function. The law does not change in its constitutional aspects even though individuals may do so.

It seems to be common to instruct the jury concerning the laws of speed by reading and explaining the statute and leaving the

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rate of speed to be decided by the jury even though there be no dispute concerning the character of the territory. Such course leaves it open for the jury to speculate concerning the law of speed applicable to the case.

It seems clear therefore that where there is no dispute in the evidence concerning the nature and character of the portion of the city involved, that when it undisputedly appears that it is not a business and closely built up section, there remains nothing for the court to do but to apply the law, and to instruct the jury that the fifteen miles per hour law applies and governs. This was the basis of the action of the court, and in this we think there was no error.

Motion for new trial overruled; judgment of dismissal on verdict of jury.

**DETERMINATION AS TO WHETHER A LEASE WAS
RENEWED.**

Municipal Court of the City of Columbus.

CHARLES E. CUMMINS V. CHARLES A. WIKOFF.

Decided, April, 1918.

Landlord and Tenant—Relaxation of Ancient Rule—That Holding Over Implies a Renewal of the Lease—Intention Now the Determining Factor—Liability for Injury of Premises in Removal of Goods by Transfer Company.

1. Where it is understood between a landlord and his tenant that the latter will vacate the premises at the expiration of his lease, and he arranges so to do, but owing to an occurrence for which he was not responsible he was delayed in so doing for two days, one of which was Sunday, the law will not imply a renewal of the lease.
2. A transfer company employed to remove household goods is the agent of the owner of the goods, and injury to the premises in removing such goods renders the owner thereof liable to the owner of the property for the damage thus sustained.

RUTH, J.

Charles E. Cummins, plaintiff herein, is the owner of premises known as No. 2263 Summit street, Columbus, Ohio, which the defendant, Charles A. Wikoff, leased by written indenture for a period of one year and ten days, said lease commencing on the 21st day of September, 1916, and ending on the 30th day of September, 1917.

Defendant moved from said premises which he occupied as a dwelling, October 2, 1917. The facts show that the 30th of September, 1917, was Sunday and defendant moved on the following Tuesday. The evidence adduced further shows that prior to the expiration of the written lease, to-wit: September 30, 1917, plaintiff and defendant had several conversations with reference to the clause contained in the lease which gave the defendant the privilege of renewing same for the period of six months after the expiration of the original lease. The plaintiff testified that he had a talk with the defendant in his office about the 20th day of September, 1917, and that a further conversation took place over the phone between plaintiff and defendant during which conversation the defendant called attention to the expiration of his lease about ten days later, whereupon, the plaintiff replied, that he thought, that the lease called for 18 months and stated he would look up the matter, whereupon the plaintiff after making an investigation called Wikoff at his office next morning, and in that conversation Mr. Wikoff wanted to know if the plaintiff could allow him to have the premises for a month or two after the expiration of the original term, to-wit, September 30, 1917, to which the plaintiff replied that he could not, and insisted that the defendant move by the 30th of September or occupy premises for another six months. The latter was not agreed to by the defendant, and plaintiff testified that he expected Mr. Wikoff, the defendant, to vacate by the 30th and he further testified that there was nothing in Mr. Wikoff's conversation that would lead him to believe he was going to continue in the premises for a further period of six months.

From this testimony of the plaintiff himself the court is warranted in concluding that no understanding or agreement

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was entered into by or between the plaintiff and defendant to either take advantage of the renewal clause in the lease or for any shorter period, so that this brings us face to face with the question as to whether or not a holding over of the premises in this case for a period of two days constitutes in law a new period for which the defendant can be held for the same duration as the written lease. If the court in deciding this question were to follow the old line of authorities and decisions, it could easily dispose of the question and the conclusion would be against defendant's contention, for the general rule laid down by the earlier authorities and decisions was:

"That where a tenant for one or more years holds over after the expiration of his term, the landlord has the option to treat him as a trespasser or a tenant for another year upon the terms of the prior lease."

In the case under consideration the landlord bringing this action signified his intention to hold the tenant under the lease. The old rule did not seem to give much consideration to the intention of the parties, but firmly held that the tenant holding over, no matter under what arrangement, or agreement, the landlord at his option could hold the tenant for a period covered by the prior lease.

Recent decisions, however, undoubtedly modify the old rule to the extent of recognizing the agreements and intentions of the parties and make that the deciding point as to whether or not a holding over by the tenant constitutes a new term.

In *Crow v. Sims*, 16 C.C.(N.S.), 257, decided in 1901, the court holds:

"Where a tenant from month to month moves out on the last day of the month, but, through the fault of his movers, some of his goods remained in the house until the next morning, there is not such holding over as to constitute him a tenant for another month. (See note 4, page 406 of 18th Vol. of A. & E. Encyc. of Law; also 133 N. Y., 287; 159 N. Y., 28.)"

From this case it will be observed the court modifies the hard and fast rule laid down by the earlier decisions and in-

clines to the more liberal and reasonable construction.

In the case of *Wheeler v. Crouse, Ex.*, 1 C. C., 127, the court holds that:

“Holding over after expiration of term *not conclusive*; such holding over is not conclusive, but only *prima facie*, and may be *rebutted*.”

This is a case where a tenant before his lease expired notified the landlord that he wanted certain repairs made upon the premises and the landlord refused and defendant then notified landlord he will not renew his lease, but hold over until such time as he can find other premises and pay one month's rent in advance and same was received by the landlord. It was held by the court:

“That the tenant is liable only for time he occupies premises.”

Here again the court applies a more natural and reasonable modification of the rule, to the effect that the intention of the parties should govern.

A recent case decided in 25 C.C.(N.S.), 385, *Walker v. Bumiller*, which dwelt largely with the question as to whether a verbal contract for a new lease from month to month, between landlord and tenant in possession under an existing written lease by the year, is within the statute of frauds. This case was decided by the court mostly on precedents and the earlier decisions which were against the foregoing question, and the court in its decision frankly admits that it was inclined to a different view, but owing to the earlier decisions of the courts, it had held with them, and a reading of the opinion clearly shows that the intention of the parties was clearly ignored and that the more reasonable and sensible construction of the rule, which the court intimated it had given the case, was sacrificed to the earlier decisions and precedents.

This court must frankly admit that it was a pleasure to read the opinion of the Supreme Court of Ohio in the 95 O. S., p. 344, *Bumiller v. Walker*, which reversed the circuit court deci-

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sion, in which the Supreme Court held "The presumption of the yearly tenancy from holding over is rebuttable"; thereby deciding directly contrary to the rule laid down in *Walker v. Bumiller*, heretofore referred to, decided by the circuit court.

The Supreme Court in 95 O. S. being the latest decision on this question in Ohio, I believe strikes the true and responsive trend of modern day jurisprudence and lays down the correct rule, which does not necessarily overrule or set aside a long and well established doctrine of the earlier courts of our state, but merely modifies and relaxes it to conform with modern day dealings between men and applies thereto a reasonable, just and sensible principle of law.

The presumption that "a tenant holding over after the expiration of the yearly term is a tenant from year to year is *rebuttable*; and to rebut this legal presumption, the parties are permitted to show what their true intention was, where the tenant remained in possession after the expiration of his former term," and establishes in this court's opinion the correct rule of law as it now is.

Applying this rule to the facts as disclosed by the evidence, to-wit, that no new agreement was entered into either in writing or verbally to renew the lease or for a shorter period and both parties expected to terminate their relations upon the 30th day of September, 1917, as landlord and tenant; and the court being convinced that the holding over to the second day of October was caused solely by the fact, that the 30th day of September, 1917, happened to fall upon Sunday, upon which day we all will concede it was impracticable to move, and the defendant having on the last day of his lease prepared to vacate said premises, but through no fault of his, was delayed from actually removing his household goods until October 2, 1917,—this court holds that such a holding over does not constitute a sufficient action on the part of the tenant for the law to imply a renewal of the lease.

A further question was raised in this case with reference to damages to the premises caused by the fault of the storage and transfer company, employed by defendant, in removing his goods to the sidewalk in front of the premises. The defend-

ant claimed that the relation of bailor and bailee existed, consequently the landlord can not recover for such injuries. In order to properly understand this contention and to realize its unsoundness we have only to give the definition of bailments which are as follows:

"A delivery of something of a personal nature by one party to another, to be *held* according to the purpose or object of the delivery, and to be *returned* or delivered over when that purpose is accomplished."

"Bailee—One to whom goods are bailed; the party to whom personal property is *delivered* under a contract of *bailment*."

"Bailor—He who bails a thing to another. The bailor must act with good faith towards bailee and *permit* him to enjoy the thing bailed according to *contract*."

From this it will be observed that no such relation existed, but that the storage and transfer company by contract became the agent of the defendant to move the household goods from one place to another, consequently defendant is liable for the damage to the premises caused by the negligent acts of his agent.

The court, after being fully advised in the premises, refuses the plaintiff's first cause of action and dismisses same, and further finds in favor of the plaintiff on his second cause of action and renders judgment in his favor for \$12.50 and costs.

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CLAIMS FOR ALIMONY PAYABLE IN INSTALLMENTS.

Common Pleas Court of Montgomery County.

KATIE M. WEIS V. CHARLES F. WEIS.

Decided, March 25, 1918.

Alimony—Continuing Jurisdiction—Deprives an Allowance Payable in Installments of the Finality of a Judgment.

A decree for alimony, made payable from time to time, where entered in a state in which there is continuing jurisdiction in alimony cases, is not a final order or judgment, and can not be made the basis of an action in an Ohio court for recovery of the amount claimed to have accrued under such decree as upon a judgment or debt of record. But where the decree includes an allowance of attorney's fees in a specified sum, judgment may be taken for the amount of such fees.

Nathan Fulton for plaintiff.*Joseph W. Sharts*, contra.

SNEDIKER, J.

This plaintiff sues upon a decree of divorce and alimony rendered on March 30, 1906, in Cook county, state of Illinois, on the chancery side of the circuit court. The action is brought as upon a judgment, the plaintiff claiming that there was a judgment, order and decree by the court that the defendant, Charles F. Weis, pay to this plaintiff, or to her solicitor, the sum of \$15 on the first day of May, 1906, and the sum of \$15 on the first of each and every month thereafter, and that he pay the sum of \$50 to the plaintiff or her solicitor as for her solicitor's fee on or before June 1, 1906. And further that this defendant pay the costs and charges of the action. Plaintiff claims to have paid the costs and charges in the action and says that no part of the judgment, order and decree of the Cook County Circuit Court has been paid by this defendant and that to this date in all it amounts to the sum of \$3,000. The petition is drawn as of March 30, 1917.

By his amended answer the defendant sets up five defenses but as we propose to confine our opinion to the third defense, it is the only one to which we make reference in full. By his third defense the defendant says:

“That by the laws of the state of Illinois, notably by paragraph 4233 of the Illinois statutes annotated, when a divorce shall be decreed the court may make an order touching the alimony and maintenance of the wife but said court may on application from time to time make such alterations in the allowance of alimony and maintenance as shall appear reasonable and proper, and that the alimony alleged by said petition herein to have been allowed by said Illinois court against this defendant and payable by him from time to time was not for a fixed and final amount and did not create a vested interest therein in plaintiff and was not and is not by said Illinois law a final order of judgment of said court.”

Replying to this third defense in the amended answer, the plaintiff says that under the laws of the state of Illinois as held by the courts of said state in different cases, alimony past due under a decree entered at the time the decree of divorce was rendered is a vested debt and property right and can not be set aside, modified, or time of payment changed by subsequent order of the court.

As we have said, this action is brought by the plaintiff upon the theory that the order of the Cook County Circuit Court at the April term of 1906 in so far as it relates to a provision for alimony to be paid on the part of a defendant is a judgment of that court. The entire entry made by the Cook County Circuit Court was a decree of divorce as between the plaintiff and the defendant on account of the defendant's fault, and thereafter the following: “The court further finds that the defendant is able to pay and should pay permanent alimony to complainant in the sum of \$15 per month commencing May 1st, 1906. The court further finds that the defendant should pay to the complainant for her solicitor's fee for services of solicitor in this cause the sum of \$50, and that said sum is a reasonable, usual and customary fee. It is therefore ordered, adjudged and decreed by the court that the defendant pay the

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complainant or her solicitor for her use the sum of \$15 on the first day of May, 1906, and the further sum of \$15 on the first day of each and every month thereafter, and that he pay the further sum of \$50 to the complainant or her solicitor as for her solicitor's fees on or before June 1st, 1906. It is further ordered that the defendant pay the costs and charges of this suit and that execution issue therefor."

This allowance of alimony by the court was made under the provisions of paragraph 4233 of the Illinois statutes which is in these words:

"When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just; and in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may enforce the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court. And the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper."

It is under Section 1, Article IV of the Constitution of the United States that the plaintiff urges her right to a judgment upon the foregoing finding of the Cook county court. Section 1 of Article IV reads as follows:

"Sec. 1. Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

It is our duty, therefore, upon the presentation of this record in evidence to give it full faith and credit. It is being here presented as a judgment. Is it entitled to that credit? If it is not, then the plaintiff should not have a judgment here entered thereon. If it is, she should have. The question is one of evidence. Evidentially taken we are to determine whether

or not this record shows a judgment and is entitled to be received as such in proof thereof.

A judgment is the final determination of the rights of the parties and whether or not the force and effect of the decree of the Cook county court is that of a judgment may be best determined from the view taken by the Supreme Court of the United States, the Supreme Court of Illinois and the Supreme Court of Ohio, all of which are before us in different decisions to which we will refer. In the application of these decisions we keep in mind the last sentence of paragraph 4233: "and the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, * * * as shall appear reasonable and proper."

In the case of *Lynde v. Lynde*, 181 U. S., page 183, in rendering the decision Justice Gray says:

"The decree of the Court of Chancery of New Jersey, on which this suit is brought provides, first, for the payment of \$7,840 for alimony already due, and \$1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of \$80 per week; and third, for the giving of a bond to secure the payment of these sums, and, on default of payment or of giving bond, for leave to apply for a writ of sequestration, or a receiver and injunction.

"The decree for the payment of \$8,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum."

The foregoing case came into the United States Court on error from the Supreme Court of the state of New York. In the courts of the latter state an effort was made to secure a judgment upon the New Jersey decree. The court of appeals in deciding the case there say in the third syllabus:

"A provision in such foreign decree for the payment of alimony in the future, however, remaining subject to the discretion of the foreign court, lacks that conclusiveness which requires the courts of this state to enforce it, inasmuch as the

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provision of the Federal Constitution referred to should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature."

Let us now turn to the opinion of the Supreme Court of Illinois as found in the 195 Ill., page 335, the case of *Welty v. Welty*, where the court in the opinion say:

"Appellant further contends, that the decree of divorce and for alimony, entered by the court on June 9, 1899, was a final decree, and that the order of June 13, 1900, having been entered at a subsequent term, was void, upon the alleged ground that the court had no jurisdiction to make such order. The general doctrine is invoked that, when an action is finally determined by the entry of final judgment and the lapse of the term, the court has exhausted its jurisdiction. This contention also is without force. It has always been the law in this state that a decree for alimony is subject to modification by the court, in which the decree was entered, according to the varying circumstances of the parties. (*Barclay v. Barclay*, 184 Ill., 375.) Section 18 of the Divorce act provides that 'the court may, on application, from time to time, make such alterations in the allowance of alimony and maintenance, and the care, custody and support of the children, as shall appear reasonable and proper.' Under this section of the statute the court is invested with power to declare the termination of all alimony upon the occurrence of facts reasonably justifying such a declaration. (*Lennahan v. O'Keefe*, 107 Ill., 620.) In *Cole v. Cole*, 142 Ill., 19, we said page 23: 'The power over the subject-matter of alimony is not exhausted by the entry of the original order, but is, under the statute, continuing, for the purpose, at any time, of making such alterations thereof as shall appear to the chancellor, in the exercise of a judicial discretion, reasonable and proper. (*Foote v. Foote*, 22 Ill., 425; *Stillman v. Stillman*, 99 Id., 196; *Lennahan v. O'Keefe*, *supra*.)"

Nor is such a decree for alimony entitled to the credit of a debt of record. In the case of *Barclay v. Barclay*, 184 Ill. Reports, the court say:

"It has been frequently held that the commitment of a defendant for contempt for refusing to pay alimony is not an imprisonment for debt from which he can claim exemption un-

der the provisions of a constitution prohibiting imprisonment for debt. (*Wightman v. Wightman*, 45 Ill., 167; *Carlton v. Carlton*, 44 Ga., 216; *Menzie v. Anderson*, 66 Ind., 239; *Allen v. Allen*, 100 Mass., 373.)

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. As heretofore shown, it may be enforced by imprisonment for contempt without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony can not be regarded as a debt owing from the husband to the wife, and not being so, can not be discharged by an order in the bankruptcy court." *Noyes v. Hibbard*, 15 L. R. A., 394.

We now turn to the decision of the Supreme Court of Ohio as found in the 83 Ohio State at page 265, in the case of *Gilbert v. Gilbert et al*, where the court quote with approval and apply in the opinion the following language:

- “An order for alimony payable in installments made in a divorce action in one state subject under the laws of that state to modification, will not support an action as on a judgment in another state as the same is not a final judgment for a fixed sum. *Lynde v. Lynde*, 162 N. Y., 405; *Bleuer v. Bleuer*, 27 Okla., 25.”

So that we have the opinion of the Supreme Court of the United States, of the Court of Appeals of the state of New York, of the Supreme Court of the state of Illinois and of the Supreme Court of the state of Ohio, all to the effect that alimony such as is here decreed by the court of Cook county is not a final judgment, and there is found in these decisions also the rule that such an order made under the laws of a state where it is subject to modification will not support an action as upon a judgment in another state. And as the rendition of a judgment upon the order here sued upon would be a vio-

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lation of what these courts have declared to be the law, the answer of the defendant as found in his third cause of defense is in our opinion good as against the petition of the plaintiff.

Supporting the authorities heretofore quoted with respect to the force and effect of a decree for alimony of this nature are 189 Mass., page 85; 27 Okla., page 25; 80 Conn., page 1.

In view of the foregoing, our finding is for the defendant except as to the fifty dollars allowance for solicitor's fees for which in accord with the opinion of the Supreme Court of the United States in the Lynde case a finding should be and is made for the plaintiff.

UNFAIR COMPETITION.

Common Pleas Court of Cuyahoga County.

THE BLACK & WHITE TAXICAB CO. v. CHARLES GOLDSTEIN.

Decided, February 7, 1918.

Choice of Color and Form of Design—May Identify a Business and Make it Known—Imitation Constitutes Unfair Competition in Trade.

Where a company, operating taxi-cabs and wagons, paints its vehicles in accordance with a uniform design and with colors so conspicuous that the general public comes to recognize them as belonging to said company, an imitation of such colors and design by a competitor, offering other vehicles for hire, constitutes unfair competition in trade against which injunction lies.

Marc J. Grossman, for plaintiff.

Rocker & Schwartz, contra.

PHILLIPS, J.

It is to the interest of the general public that the right and opportunity to engage in any kind of legitimate business should be free to all our people. It is equally important that where one man has established a business, and built it up by means that are peculiar to his business and his conduct thereof, and where

that means of making his business conspicuous, and thereby successful, has been incorporated into it so that his business and his proprietorship have become known to the public, known to his patrons by reason of its peculiarity—it is just as important that he should be protected in his business that he should be protected from interference with that peculiarity of his business by any one who would divert his business from him, who would break up his business, or injure it in any way, by imitating this peculiarity that is so identified with no other business. What inducement would there be for one man to build up a business by a certain course of conduct in his business, a certain means of advertising himself in his business, if when he became established, anybody else who wanted to steal that from him, who wanted to benefit by what he had done in building up and benefitting the business, should be allowed to do so. An invention is protected by the federal government by letters patent; that is to encourage men to invent and get all benefit of their work from invention for a limited period while there is a patent. That excludes everybody else, and that is fair to the man who made the invention; that encourages men to invent, and the business world has made great progress by reason of that protection given to the man of inventive genius. Trade-marks may be patented; that is given to the party using the trade-mark and obtaining this protection, which is to give him exclusive benefit of his trade-mark and excluding everybody else from using it. It is the means of identifying his business and his product or whatever it may be that is designated by the trade-mark; it is to give him exclusive benefit of that feature of his business and exclude everybody else from it; and that is fair to everybody. If I have established a business and brought it to a success by the use of a trade-mark, by the use of a patented invention, by the use of anything that distinguishes it to the buying public—if I have done that, upon what theory of right and justice could it be said or maintained that somebody else could come in and appropriate that to his use and to my detriment? That would be discouraging; that would be inviting men to use deception in their business, and so on. I need not comment upon

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these features. I think they are plain to everybody who takes time to think about it.

Now I think this case does not involve the matter of colors, the object of this action for injunction is not to give the plaintiff a monopoly of some color that he may be using in his business. A man could not by the use of any one color, obtain a monopoly in the use of such color. The colors involved here are black and white. The plaintiff does not seek to prevent the defendant from using the white color on his cab; plaintiff does not seek to prevent the defendant from using black and white on his cabs. If this injunction shall be granted as prayed for it would not restrain the defendant from using black or white or white and black in the color of his cabs. The purpose of this action is to restrain the defendant from using a certain combination of these two colors in such close imitation of the combination used by plaintiff that the public will be misled by it, and that the defendant will thereby obtain the benefit of a certain combination of these colors that belongs to the plaintiff. The object of using these colors in this combination is to make the plaintiff's vehicles conspicuous and to identify them and associate them with his business; and people who are familiar with the black and white taxicab used by the plaintiff may not look beyond that in selecting or employing the taxicab. That is such a conspicuous feature of plaintiff's business that a vehicle on the street having these colors will be known at once by people that have any interest in that kind of business, will be recognized at once as a vehicle belonging to the plaintiff; and the resemblance of defendant's vehicle is so close that people may be misled by it and give employment to the defendant believing they are giving it to the plaintiff. A man going to employ a taxicab will not go and examine the make of the machine and make an inspection of it; he would see it fifty yards away and just give it a casual glance and take it to be a vehicle belonging to the plaintiff if he was looking for a vehicle belonging to the plaintiff, if he was a patron or wanted to become a patron for the time of the plaintiff. The kind of inspection that is given to such matters in the affairs of life would not reveal the difference, would not disclose the imita-

tion, and a patron might be misled to the detriment of the plaintiff and to the disappointment and possible detriment of the patron; and the defendant would wrongfully get the benefit of the reputation that the plaintiff may have established and built up in its business, which would be diverting business that really belonged to the plaintiff. Now that is not allowable; I do not care whether it deals with colors, labels, or what not. It is a kind of deception which the courts can not uphold.

This similarity in colors is not accidental; it is studied. This design has evidently been adopted by the defendant because of the familiarity of the public with that design of taxicab; he came to use that design or kind of advertising after it had been used by the plaintiff and after plaintiff had expended a considerable amount of money in building up a business in which this color scheme has played an important part and had become identified with plaintiff's business, and the public had become acquainted with it in such way that plaintiff thereby had the confidence and good will and patronage of some portion of the public. Now that belongs to the plaintiffs; that is an advantage they have made for themselves. The defendant ought not to be allowed to surreptitiously take it away from them. The similarity of the cars used by the plaintiff and those used by the defendant is such that it shows conclusively that the one was made in imitation of the other; there is nothing particularly attractive about that color of taxicab, nothing except the novelty of it. Those are not attractive colors for an automobile. It makes the machine conspicuous; it attracts attention because of its novelty, not because of its beauty; it makes it conspicuous and therefore gives character and identity to plaintiff's business. Anybody would just as soon ride in an automobile of some other color. I think I would a little rather take a machine, if I was going to hire a taxicab, that was not quite so conspicuous; but it attracts attention; it is a good way of doing that. If the defendant, as he says he did, admired those colors and admired that combination—I mean a combination of black and white—on his machine, how does it come that he selected a design almost identical with that of the plaintiff. I think the evidence shows very clearly that these colors and this combination of colors or form of the

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decorations on the machine were adopted because the plaintiff had used them, and with apparent success; they had attracted the attention of the public, or part of the public, to their taxicab business by the use of this peculiar combination of colors on their wagons.

I think it is clearly a case of unfair competition. I would hardly say the plaintiff has acquired a property right in the use of these colors, and this combination of colors; it may not amount to a property right, but it has become so identified with their business that it has become a part of their business. Defendant may compete with the plaintiff in the taxicab business, but his competition must be fair. He must not be allowed to steal away from them, nor to undertake to steal away from them, what they have used and which is so identified with their business that it has become a part of the business they are engaged in. If the plaintiff should cease to use these colors and this combination of colors they would lose a certain status of publicity and identity, they have acquired by the use of this combination of colors on their wagons; therefore it is a thing of value to them.

I do not remember what the prayer of the petition is—

Mr. Rocker: If this is a case where the court will grant the prayer of the petition I think it would be no more than fair to allow us time to make these changes, or the business of the defendant would be entirely at a standstill.

The Court: I agree with you in that, although the defendant's invasion of the right of the plaintiff has been wrongful, I think it would only be fair that we should not protect the plaintiff by destroying the defendant. He ought to have a reasonable opportunity to stop the use of these colors and this combination.

Mr. Schwartz: I want to ask the court if the defendant would paint his cars entirely white other than the leather part of the car, which could not be painted white; would that be within the court's ruling in competition with the plaintiff?

The Court: I expected that question. I anticipated you. I was looking for a question of that kind from you. I have found it a pretty good practice to decide law suits only after they are brought and submitted, and I think I shall do pretty well to decide the questions I have to decide, and decide them rightly. I

would rather not express my opinion about that, but as I said I was expecting I might be confronted with a question of that kind. I have not looked up the law on that, and really I have not any decided opinion about the question you have asked. Certainly if I am right in my view of this case, the defendant ought to abandon the use of colors and combination of colors of his wagons that would tend to deceive the public. He ought so to change his wagon in that respect that his vehicles might not be mistaken for those of the plaintiff. I think that would be the principle that ought to govern. Whether to paint the vehicle entirely white would be an invasion of the plaintiff's rights I have no definite opinion. While it came into my mind I did not try to consider it so as to form any opinion about it. I gave my attention to the question I knew I would have to decide. Now I do not like to make an order that would look like punishment of the defendant.

Mr. Grossman: It is not our desire to punish or harass the defendant. We are content to give him a reasonable length of time.

The Court: The defendant has a business and a patronage, and that ought not to be disturbed, other than it must be disturbed in order to protect the plaintiff.

Mr. Rucker: I was going to suggest, Your Honor, that he be allowed a certain time for each cab, so that he can keep cabs running. We do not want to be obliged to take the cabs from the street. We would like a certain time for each cab so he may operate them continuously without taking them all off at one time.

The Court: I think you gentlemen can agree upon the journal entry to protect both parties. I have said, "Injunction granted as prayed for, see journal." The entry will have to be prepared and O. K'd by both of you gentlemen and by myself before it can be journalized.

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Edwards v. Edwards.

**DIVORCE PROCEEDINGS MUST BE IN LITERAL CONFORMITY
WITH THE STATUTES.**

Common Pleas Court of Franklin County.

EVIE EDWARDS V. ANNA EDWARDS.

Decided, September Term, 1917.

*Jurisdiction—Not Acquired in Actions for Divorce—Except by Strict
Conformity With the Statutes—Waiver Not Permissible.*

1. The provisions of the divorce statutes are mandatory and must be literally complied with before jurisdiction is acquired to hear the case; from which it follows that summons and entry of appearance can not be waived, but service either personal or by publication must be shown.
2. Entry of appearance with a request for restoration to maiden name constitutes *prima facie* evidence of consent by both parties to a divorce, which is on its face collusive and contrary to public policy. (*Lewis, 1 L. ed. 2d 111*)

E. E. Corwin, for plaintiff.

KINKEAD, J.

On trial of this action for divorce it appeared that plaintiff came to Columbus from Jackson county where he had lived with his wife, and where he owned and still owns a home in which he lived. He lived with his sister two months in Columbus, filing his petition for divorce after residing here thirty days. After two months he returned to Jackson county where he was, and at the time of hearing, is still employed. No summons was issued, but counsel sent a waiver of summons to the defendant in Scioto county, together with a copy of the petition. A letter accompanying the waiver stated that the waiver was merely to save costs; that if summons was issued to the sheriff of the county where defendant lived, the people in her neighborhood would think she was being sued, and it would make extra costs. The waiver was signed, to which was also attached a request by defendant that she be restored to her maiden name.

Plaintiff owns real estate and asks that defendant's rights therein be barred. The ground of divorce is that defendant deserted plaintiff prior to March, 1916, for several weeks at a time, and about the middle of March, 1916, she again deserted plaintiff, and that she has ever since remained away.

Section 11983, General Code, provides that when defendant is a resident of this state "the clerk *shall* issue a summons directed to the sheriff of the county in which he or she resides, * * * and which, together with a copy of the petition, *shall* be served on him or her at least six weeks before the hearing of the cause."

Section 11985 provides that the cause may be heard and decided after the expiration of six weeks from service of summons. These provisions are to be regarded as mandatory and expressive of the public policy of the state, which must be literally complied with before the court has power to even hear a case; and no divorce case can be heard prior to six weeks after service of summons.

Not only do the considerations of public policy as shown by the mandatory character of the provisions of the statutes referred to demonstrate the utter impropriety of permitting waiver of summons and entry of appearance in divorce cases, but on the other hand an entry of appearance coupled with a request for restoration of name, as in the waiver now before the court, constitutes *prima facie* evidence of a consent by both parties to a divorce, which is on its face collusive and contrary to public policy. See *Lewis v. Lewis*, 1 Dayton Term (Iddings), 11.

A compliance with the statute requiring personal service or advertisement can not be dispensed with. *Ferrell v. Ferrell*, 1 Ohio Dec. Reprint, 135, 2 West L. J., 427; *Bettinger v. Bettinger*, 4 Pa. Dist., 441; *Weatherbee v. I. d.*, 20 Wis., 499.

A waiver of summons does not, in fact, vest the court with jurisdiction. A proceeding in divorce is statutory, hence the provisions of the statute must be followed to confer jurisdiction.

The prayer for divorce is denied because no action is pending.

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CHILD THROWN FROM CAR AND INJURED.

Superior Court of Cincinnati.

GEORGE MORRIS, BY HIS NEXT FRIEND, LILLIE MORRIS, v. THE
CINCINNATI TRACTION CO.

Decided, November 28, 1917.

*Negligence—Street Car Conductor Goes Forward to Talk With Motor-
man—Child Carried by His Destination Leaves His Seat and is
Injured.*

Negligence toward a traction car passenger is not shown by the mere fact that the conductor went forward to talk with the motorman, but responsibility on the part of the company would be shown if it were made to appear that the conductor remained away from his post for three or four squares, and the passenger was a child four years of age, and in the meantime his destination was passed and no heed was paid to his signal to stop, and going to the rear of the car he was thrown off and injured.

*Weiland & Rubenstein, for plaintiff.
Sherman T. McPherson, contra.*

GUSWEILER, J.

This case is a very unusual one. Plaintiff, a minor four years of age, boarded one of defendant's cars for the purpose of going to school. The petition alleges that some time before plaintiff had reached his destination the conductor walked to the front of the car and for a distance of three or four blocks remained in conversation with the motorman, neglecting to attend to his duties toward passengers upon the car; that the bell, notifying the conductor to stop the car at plaintiff's destination, was rung but that the conductor "by reason of his negligence in being at the front of the car" did not stop the car; that he, plaintiff, walked to the rear platform for the purpose of preparing to leave at the place of destination, and that he was thrown from the car while it was turning the corner of Park avenue and Chapel street.

The case is one of first impression. The duties of a conductor toward the passengers upon the car are fairly well defined, but so far as we are informed there is no rule of law which prevents the conductor from going forward at any particular time for the purpose of talking with the motorman.

The traction company in law owes the highest degree of care for the safety of its passengers in the practical operation of its cars. The age of the child and all the circumstances surrounding the accident must of course be taken into consideration. The mere fact that the conductor was forward in the car talking to the motorman, of itself alone does not indicate negligence as a matter of law; but if he failed to give to this child four years old the greatest degree of care for his safety under all the circumstances, and the bell was rung and said conductor failed to heed said bell and remained with the motorman for three or four blocks of the car's movement, and it is found that his negligence in this respect was the proximate cause of the child's injuries, the traction company would be responsible.

Whether the conductor's action in this regard was in any way negligent, or whether it prevented the performance of his duties toward the passenger, can be determined only when the facts are presented upon the trial of the case. Accordingly we think that the demurrer should be overruled. The same question may, of course, be raised by a motion to direct a verdict at the close of plaintiff's testimony.

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Permits may be lawfully required for use of the streets for assemblage and public speech; power to grant or refuse such permits may be vested in the safety director. 241.

Where the penalty prescribed by ordinance for the use of profanity in public places exceeds that for

disturbance of the peace it is excessive and invalid. 289.

A municipality is not liable for damage to abutting property from an excavation made in the street to a depth of more than nine feet. 346.

Evidence indicating that the sewer complained of was built by an independent contractor and not by the city, abutting owner whose property was injured by reason of the excavation must look to the contractor. 346.

NAMES—

The full names of the parties to an action in partition should appear in the caption to the petition and again in the decree. 116.

NEGLIGENCE—

Aunt and niece attempt to board a street car; aunt is admitted but door shut in face of niece; aunt then demands that she be permitted to get off and in attempting to do so is thrown and injured by starting of the car. 433.

Street car conductor goes forward to talk with the motorman; in the meantime a child is carried past her destination and going to the rear platform is thrown off and injured. 607.

Action under the federal employers' liability act; application of the doctrine of *res ipsa loquitur*; provision that suit must be brought within two years not a statute of limitations but a condition to the right to bring the action; acceptance of employment during period of disability constitutes a new contract and the right to sue for the tort is lost. 33.

Proximate cause is not necessarily the direct and immediate cause, but a remote act in point of time, concurring at the time of the injury with a second act, may be the immediate and efficient cause of the injury. 41.

Where property is out of repair and in a ruinous condition, and at the time of leasing as well as after possession taken by the lessee the lessor promises to repair, and injury occurs to a child of the tenant from failure to repair, the lessor is liable therefor. 41.

That the proximate cause of the injury is necessarily the direct and immediate producing cause, is a correct statement of the legal doctrine where the intervening cause is one which in the light of all the circumstances should have been foreseen as likely to occur. In such a case the prior or antecedent act and not the one nearest in point of time is to be regarded as the direct and immediate cause of the injury. 41.

When ultimate facts stated in a petition disclose that the party responsible for an antecedent or prior act should have foreseen an intervening act as likely to occur, the prior act is to be regarded as the direct and immediate cause of the injury. 41.

Whether the prior or the intervening act is to be regarded as the direct and immediate cause of the injury is to be determined by the fact whether the one responsible for the first act might reasonably have foreseen that the second or intervening act would or might occur. 41.

NEW TRIAL—

A motion for a new trial does not lie in a divorce case in which alimony is not involved. 94.

NEXT OF KIN—

The construction to be placed on the phrase "next of kin," as used in Sub-section 6 of Section 8574, General Code, makes the brothers and sisters of an intestate or their legal representatives nearer of kin than their parents or grandparents, and the brothers and sisters of the father and mother of the intestate are nearer of kin than the grandparents. 1.

NOTICE—

What constitutes notice by a creditor board of education to a debtor board that a claim will be made for tuition of children attending school out of their own district. 193.

Of the priority of debentures of a constituent company upon the fund received from a sale of its property by the consolidated company. 219.

OFFICE AND OFFICER—

No right of appeal has been provided where a removal has been made from the classified service otherwise than in accordance with law. 113.

Mandamus, where a policeman had been removed without being furnished with the reasons therefor. 113.

In the absence of a statute to that effect a public officer or agent is not individually liable on a contract entered into by him in that relation with another while acting in good faith and with no express understanding to that effect. 539.

Members of a board of education are not officers of the "state, county, township or municipal corporation" within the contemplation of Section 17, G. C., and are not personally liable under a contract made by them without an appropriation having been first made therefor. 539.

ORDINANCES—

Courts do not take judicial notice of ordinances. 545.

PARENT AND CHILD—

Demurrer lies for misjoinder of parties, where the action is against a father for damages on account of the tort of his minor son in assaulting plaintiff, and the allegation is of negligence on the part of the father in failing to protect plaintiff, knowing the child's reckless and bad character, and they are not charged as joint tortfeasors. 59.

PARTIES—

Effect of failure to make an heir by one of the lines of descent a party to an action for sale of property to pay debts, where the said heir had knowledge of the proceedings. 1.

Minors holding an interest in land which is about to be partitioned should be made parties. 116.

Children of one to whom land was entailed are necessary parties to an action to set the will aside. 439.

PARTITION—

In an action for partition of property in which an interest is held by minors, the fact that the guardians of said minors have been made parties and have filed answers is not sufficient, but the minors themselves must also be made defendants and served with summons. 116.

The full names of all the parties to the action should appear in the caption to the petition and again in the decree. 116.

PARTNERSHIP—

Use by a partnership of money borrowed by an individual member on his own note does not make the partnership liable to one who thereafter paid the note. 254.

Where partnership assets are seized on execution by partnership creditors, the members of the firm are not entitled to statutory exemptions in lieu of homestead. 510.

Dissolution of a partnership in good faith by written contract with distribution of assets between partners with no provision for firm debts renders such assets the separate estate of the former partners, and each partner may be allowed statutory exemption even as against firm creditors. 510.

PENALTY—

The penalty for violation of an ordinance is an inseparable part of it, and if illegal or excessive invalidates the ordinance. 289.

An ordinance imposing a maximum penalty of \$200 for use of profane language in public places is invalid. 289.

Where the statute authorizing an ordinance prescribes a fine of \$50 as the maximum penalty, a fine of \$50 under an ordinance prescribing a maximum penalty of \$200 is excessive. 289.

PERJURY—

Prosecution for, based on statements in the verification of a petition, made on belief but known by the affiant to be false. 499.

PLEADING—

There is no provision in the code for the filing of an answer in an appropriation proceeding, and where an answer has been filed it is subject to a motion to strike it from the files. 10.

False statements in verification of a pleading on belief is a basis for prosecution for perjury. 499.

A defendant need not plead an ordinance upon which he relies to defeat the plaintiff's claim. 545.

POLICE—

Exercise of discretion by, in preventing public disorder. 188.

PRESUMPTION—

A presumption always arises against the validity of a purchase or sale between a client and attorney during the existence of that relation. 278.

Presumption that a second will was destroyed by the decedent prior to her death. 305.

PROBABILITY—

Not a sufficient basis for a conclusion unless founded upon a reasonable inference. 529.

PROFANITY—

The penalty fixed by ordinance for use of profanity in public places must not exceed that prescribed by statute for disturbance of the peace, an affidavit charging the use of profanity need not set forth the language used. 289.

PROMISSORY NOTES—

See **BILLS, CHECKS AND NOTES.**

PROPERTY—

Determination as to whether property is ancestral. 303.

PROXIMATE CAUSE—

Criticism of the expressionless statement that the question of proximate cause is ordinarily one for the jury. 41.

PUBLIC CONTRACTS—

A public officer is not personally liable on a contract entered into in good faith by him in his capacity as officer. 539.

PUBLIC UTILITIES—

The act creating the Public Utilities Commission is valid and enforceable in so far as it vests in the commission control over railway rates. 401.

The authority of the commission is not restricted by contracts affecting private interests. 401.

Schedule of rates fixed by the commission over an interurban line substituted for a pre-existing schedule fixed by agreement with a corporation in consideration for the grant of a right-of-way. 401.

RAILWAYS—

Priority of debentures of a constituent company which were made a first lien upon its property and franchises prior to consolidation, where the debts of the constituent company were assumed by the consolidated company. 219..

Creditors of a consolidated company have notice of the priority of debentures of a constituent company in the same manner as of a prior recorded mortgage on the same property.. 219.

Recovery by the representative of an employee injured in interstate traffic is barred where settlement was made with the said employee in his lifetime. 573.

REASONABLE DOUBT—

See **EVIDENCE.**

RES IPSA LOQUITUR—

Doctrine of, does not apply in an action for injuries under the federal employers' liability act unless some compelling reason, such as positive negligence on the part of the master, makes its application necessary. 33.

ROADS—

Assessments according to benefits for improvements of, under the provisions of Section 1208, as amended; duty of township trustees with reference to apportioning the amount to be paid by abutting property; injunction lies against the collection of assessments which are grossly excessive, unjust and disproportionate to the benefits received. 120.

SCHOOLS—

Under the law providing that in all rural and village school districts transportation shall be provided for pupils who live more than two miles from the nearest school house, distance is to be computed by including the distance from the exit of the curtilage by the most direct path or way to the point where it intersects the highway leading to the school house. 126.

Knowledge by the board of the district that certain children are attending in another district and acquiescence therein satisfies the requirement as to notice of a claim for tuition for such children. 193.

Contract for repair of a school building for which no appropriation had been made; members of the board not personally liable thereunder. 539.

SEWERS—

As to damages resulting to abutting property from an excavation in the street for a sewer. 346.

SIDEWALK—

A sidewalk and street improvement must be made under separate legislation; notice to abut-

ting owner is a prerequisite to the levying of a valid assessment. 437.

SLOT MACHINES—

May be treated as gambling devices, when. 525.

STATUTES CONSIDERED—

Section 10774, relating to the sale of real estate to pay the debts of a decedent. 13.

Section 10817, providing for sale of real estate to pay legacies. 13.

Section 5508, relating to liability of foreign corporations doing business in this state. 17.

Section 6308, giving jurisdiction in actions for injury to person or property by a motor vehicle in a county other than that of the owner's residence. 30.

Section 11625, relating to costs, is not repealed by Section 6308, giving jurisdiction over the owner of a motor vehicle in a county other than that of his residence. 30.

Section 7731, relating to the transportation of pupils to a centralized school. 126.

Section 7735, relating to attendance of school children outside of their districts. 193.

Section 7419, relating to tax levies for road repairs. 233.

Section 12603, making it an offense to operate a motor vehicle on public roads or highways at a speed greater than is reasonable or proper. 372.

Section 11462, providing for submission of special forms of verdict. 257.

Section 10255-1, relating to the jurisdiction of justices of the peace. 449.

STREET—

Rights of abutting owners when the authority to occupy a street with an additional railway track is being appropriated. 10.

Use of streets for public meetings; permits from the safety director so to do may be required. 241.

STRIKES—

An excessive number of pickets about a plant in which a strike has been declared is calculated to defeat the avowed purpose of the union to peaceably persuade the men at work to join the strike, and the said purpose is also defeated by the use of automobiles loaded with strikers which follow the men to their homes at night, deriding them in an abusive and obscene way accompanied with threats; limitation on the use of pickets and automobiles. 161.

Injunction lies against individual members of a union who have been shown to have interfered, for the purpose of intimidation, with the business of the plaintiff employer and destroyed property rights by participating in or encouraging assaults on the men remaining at work; but in the absence of evidence that such conduct was authorized or approved and encouraged by the members of the union as a whole they can not be reached as a class by injunction on the theory of agency. 161.

When members of the union as a class become amenable under an injunction issued against individual members of the union. 161.

An injunction issued in a strike case, restraining the distribution of so-called "scab" circulars and the making of verbal and written threats in furtherance of a conspiracy to intimidate, etc., does not violate the free speech provisions of our Constitution, when such order is limited to the prohibition of such acts "for the purpose of intimidation," etc. 161.

SUMMONS—

Should be served on minors having an interest in land which is being partitioned. 116.

Service of summons on the managing agent of a foreign corporation is unauthorized and confers

no jurisdiction on the corporation, where the said agent has a personal interest in the action as plaintiff or otherwise antagonistic to his duty in the capacity in which he is served with process, notwithstanding he may be within the terms of the statute authorizing service. 159.

Service on a non-resident defendant in an action for alimony must be by publication, and where the return shows that it was personal, a motion lies to set the service aside. 184.

SUNDAY—

Injunction lies against the leasing of a county memorial hall for the giving of a moving picture show on Sunday. 417.

TAXATION—

Enjoyment of a privilege is not property within the laws relating to taxation. 538.

Membership in the New York Stock Exchange does not constitute property but is a mere personal privilege and is not taxable even though the owner of such membership is a resident of Ohio. 538.

TENANTS IN COMMON—

As between tenants in common the entire possession by one will not generally cause the statute of limitations on adverse title to run against a co-tenant. But if the possession is asserted as exclusive owner openly, unequivocally, adverse, hostile and to the exclusion by overt act against and with actual notice to another co-tenant, it will ripen into an indefeasible, adverse, perfect title in favor of the occupying tenant. 1.

TIME—

Within which papers may be filed in court; practice of a county clerk of treating papers as filed on that day where left for filing

after office hours is reasonable and such papers will be treated as filed in time. 223.

TITLE—

Non-ancestral property passes to children first, then to the children of the decedent, and then to his brothers and sisters. 1.

Where taken under an assumed name and the owners of claims upon which they were entitled to obtain valid mechanics' liens were thus prevented from obtaining valid liens, the claims may be validated for duplicity of the debtor. 150.

TOWNSHIPS—

Duty of township trustees with reference to apportionment of the amount to be paid by the owners of abutting property for the improvement of highways under the provisions of Section 1208, as amended. 120.

TRIAL—

A motion for a directed verdict for the defendant lies in an action for damages sustained by fire which it is alleged was started by one of the defendant's locomotives, when. 529.

It is sometimes the duty of a trial judge to interrogate witnesses. 545.

Judicial functions and those belonging to the jury. 581.

TRUST—

Can not be engrafted by a husband on property standing in the name of his divorced wife. 447.

UNFAIR COMPETITION—

Imitation constitutes unfair competition in trade; choice of color and design may identify a business and make it known. 599.

VERDICT—

A verdict by three-fourths of the jury is valid in all cases tried

in the common pleas court or municipal or justices' courts which are not criminal cases. 209.

Three-fourths of the jury may return a valid verdict in a hasty case. 478.

May not be returned against joint defendants with damages apportioned among them; trial judge may direct jury to go back to their room and return a verdict which, if for the plaintiff, must be against both defendants or against one of them and in favor of the other. 481.

Motion for judgment against one of two joint defendants notwithstanding the verdict returned does not lie, when. 481.

A motion for a directed verdict for defendant lies when the circumstances shown to have existed at the time fail to afford a basis for a fair and reasonable inference as to the cause of the damage complained of, but rests wholly on guess and conjecture. 529.

Verdict for \$17,000 in favor of a woman badly injured by being thrown by premature starting of street car; verdict sustained. 257.

Counsel desiring a special verdict may submit a form, and opposing counsel may do the same, but the jury may disregard both and return a verdict according to a form prepared by themselves. 257.

The jury may be informed as to which party presented the different forms of verdict; duty of the court to instruct the jury as to the proper form of verdict and the special facts to be found; general instructions may also be given. 257.

If a special verdict contains conclusions of law as well as findings of facts, the court may disregard the conclusions of law and make its own conclusions from the facts found. 257.

WAIVER—

Of the right of homestead exemption can not be done by executory contract. 577.

Of a statutory provision in an action for divorce is not permissible. 605.

WATER AND WATER-COURSES—

One protecting his property from the common menace of flood waters is not liable for damages on account of resulting injury to the property of his neighbor who took no steps to protect himself from the encroaching waters. 375.

WIDOW—

Where property is bequeathed to the heirs at law of a deceased brother, the widow of said brother shares as an heir in all personalty, including proceeds from property reduced to cash by direction of the testator. 129.

WILLS—

Where a testator's personalty is not sufficient to pay his debts and costs of administration, and the legacies provided for in the will are not made a charge on his real estate, proceeds from sale of realty do not fall into the residuum but pass to the heirs, and the legacies fail for want of a fund out of which they may be paid. 13.

Whether or not an executor may defend in a contest of the will of the testator and have the expense of the defense so made allowed as a legitimate charge against the assets of the estate depends upon the circumstances of each particular case. 49.

Where the will provides for payment of a legacy to the executor, a presumption arises that the legacy is at least one reason for a defense of the will being undertaken by the executor, and the expense so incurred, even though the defense is successful and the will

is sustained, is not properly chargeable against the estate. 49.

An executor not being bound to assume the burden of defending the will under which he is acting, it must be made to appear, before the expenses so incurred can be allowed as a charge against the estate, that the burden was assumed from disinterested motives and that the estate has received benefit from the defense made. 49.

A bequest by a testator to his wife of all the income from his estate, real and personal during her natural life, is a general bequest of the income from the residuary fund and begins to run from the moment of his death; first year's allowance; compensation to executrix who is also a life tenant. 60.

Under a bequest of one-third of my estate "to the heirs at law of my deceased brother B. W.," the widow of said deceased brother shares as an heir in all personalty, including proceeds of property reduced to cash by direction of the testator. 129.

Construction of the bequest "to my legally adopted daughter" of "all my property, real, personal and mixed, the same to be hers in fee simple." 180.

In an action to set a will aside, an attorney who witnessed the will is competent to testify as to the testamentary capacity of the testator. 209.

By attaching his name thereto a witness to a will certifies by implication that the testator is of sound mind and of testamentary capacity. 209.

Testimony that one of the witnesses to the will, now deceased, had stated subsequent to the execution of the will that it was invalid because of the incapacity of the testator, is inadmissible. 209.

Declarations by beneficiaries reflecting on the capacity of the

testator, are not admissible in chief, and are only admissible in rebuttal for its bearing on the credibility of the witness. 209.

A verdict by three-fourths of the jury is valid in a will case. 209.

The law of Ohio forbids the setting aside of a will by the consent or collusion of those who are interested as beneficiaries and contestants. 225.

One who is contesting a will may not settle with legatees by purchasing their legacies with the intention of having the will set aside. 225.

It is contrary to public policy for agreements to be made by a contestant of a will which have a tendency to retire contestants who are legatees and thus make it possible that other legatees shall be defeated in their rights. 225.

Equity will not permit the same person to hold under and against a will, and a plaintiff who has made a settlement with some of the legatees thereby arrays himself on both sides of the action to contest the will and can not be permitted to further prosecute the action. 225.

The character of property devised is not changed from ancestral to non-ancestral by the fact that the devisee is charged with payment of a legacy to one named in the will and the property is made subject to a lien securing said payment. 303.

Where a second will can not be produced, and there is no evidence that it was lost or destroyed after the death of the decedent or was in existence at the time of her death, a presumption arises that it was destroyed by the testatrix herself, and the burden of proving the contrary is on the proponents. 305.

The fact that the decedent was under legal disability for some time after the making of the second will, does not raise a presump-

tion that the will was destroyed during such disability, when it appears that time intervened between the making of said will and the beginning of her disability and also between her restoration to reason and her death. 305.

Effect of an endorsement by the testatrix in her own handwriting, in which after the execution of a second will she attempted to change the beneficiary of one of the legacies, provided for in her first will. 305.

Legal disability at the time of making such an endorsement upon her first will does not necessarily show mental incapacity, but may be taken as a circumstance indicating an intention on her part to republish said first will. 305.

A verbal contract to make payments to heirs, in consideration of their forbearing suit to contest the will, does not fall within the statute of frauds where both parties elected to treat the contract as valid and there has been part performance. 321.

The probate of a will is in no way dependent on the character of the devises made. 433.

Rights of children under a will which entailed lands but was set aside; title to entailed lands good in purchaser and interest of children transferred to the fund. 439.

Flexible meaning of the word "heirs"; technical meaning of this word will not be adhered to where manifestly contrary to the intention of the testator; in determining intention resort may be had to the whole contents of the will. 501.

Devise to a son for life "and to his heirs" held to have passed, upon a death of the son without issue, to the heirs of the testator, and not to the widow of the son. 501.

WORDS AND PHRASES—

Meaning of the words "next of kin" as used in Sub-section 6 of Section 8574, General Code. 1.

Definition of the words "heirs at law" where personalty is involved. 129.

Flexible meaning of the word "heirs." 501.

WORKMEN'S COMPENSATION—

The amendment of 1917, making existing indemnity insurance void is not retrospective with reference to existing insurance; such legislation is valid because of a character which might be reasonably anticipated by those so contracting. 513.

Where the decedent was the sole support of the claimant who is in a crippled condition and without an estate of her own, the fact that she has children who might support her but do not is not sufficient to defeat her claim. 569.

Death will be held to have resulted from an injury received during the course of employment, where the resulting emaciation and debility greatly accelerated the disease from which the decedent died. 569.

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